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No. 1

Supreme Court, U.S.

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In The

Supreme Court of the United States

OCTOBER TERM, 1987

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY, and
THE BOARD OF TRUSTEES OF
THE UNIVERSITY OF MEDICINE
AND DENTISTRY OF NEW JERSEY,

Petitioners,

-VS-

ANNE FUCHILLA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY**

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QUESTIONS PRESENTED

- I. Whether a state-created university which is supported by substantial state appropriations and is governed by a Board of Trustees all of whom are appointed by the Governor of the State with the advice and consent of the State's Senate and who are given a legislative mandate to operate a program of medical and dental education which "shall be deemed to be public and essential governmental functions necessary for the welfare of the State" is a "person" subject to suit under the Federal Civil Rights Act, 42 U.S.C. § 1983?
- II. Whether the provisions of New Jersey's Tort Claims Act which require a plaintiff to file a notice of claim prior to instituting suit

against a public entity apply to
actions brought pursuant to 42
U.S.C. § 1983 in state courts?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the
Supreme Court of New Jersey are Anne
Fuchilla, the University of Medicine and
Dentistry of New Jersey and the Board of
Trustees of the University of Medicine
and Dentistry of New Jersey. Claims
against a co-defendant William A. Layman
in this matter were dismissed at the
trial level and he is no longer a party
to the proceeding.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY and
THE BOARD OF TRUSTEES OF
THE UNIVERSITY OF MEDICINE
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Petitioners,

vs.

ANNE FUCHILLA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

The petitioners, University of Medicine and Dentistry of New Jersey and the Board of Trustees of the University of Medicine and Dentistry of New Jersey, hereby petition this Court for a writ

of certiorari to review the judgment of the Supreme Court of New Jersey.

OPINIONS BELOW

The Order of the Law Division, Superior Court of New Jersey, dismissing the complaint for failure to file a notice of claim was entered on March 20, 1985, and is reproduced in the Appendix to this Petition (App.E). The opinion of the Appellate Division, Superior Court of New Jersey rendered on May 27, 1986 and reversing the dismissal of the complaint is reported, Fuchilla v. Layman, 510 A.2d 281, 210 N.J. Super. 574 (App. Div. 1986), and reproduced in the appendix to this petition (App.B). The opinion of the Supreme Court of New Jersey rendered on February 8, 1988, affirming the Appellate Division decision and remanding the matter to the Law Division is

reported at 537 A.2d 652, 109 N.J. 319 (1988) and reproduced in the appendix to this petition (App.A).

STATEMENT OF JURISDICTION

The decision for which review is sought was rendered by the Supreme Court of New Jersey, the highest Court of the State of New Jersey, on February 8, 1988 (App.A). This Court has jurisdiction to review that decision by writ of certiorari pursuant to 28 U.S.C. §§ 1257(3) and 2101(c). While the New Jersey Supreme Court remanded the matter for trial, the judgment on the federal questions of whether the University is a "person" under 42 U.S.C. § 1983 and whether the state notice of claim provisions apply to § 1983 actions "are plainly final on the federal issue and ... not subject to further review in the state courts." Cox

Broadcasting Corp. v. Cohn, 420 U.S. 469, 485 (1975). Accordingly, the judgment below is "final" within the meaning of 28 U.S.C. § 1257. Calder v. Jones, 465 U.S. 783, 788 n. 8 (1984); New York v. Quarles, 467 U.S. 649, 652 n. 1 (1984); North Dakota Pharmacy Board v. Snyder's Stores, 414 U.S. 156, 159-64 (1973).

CONSTITUTIONAL AND STATUTORY PROVISIONS

(1) The Eleventh Amendment to the Constitution of the United States:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens or Subjects of any Foreign State.

(2) 42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the

United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq. Pertinent portions of this Act are reproduced in the Appendix as Appendix C.

4. The Medical and Dental Education Act of 1970, N.J.S.A. 18A:64G-1 et seq. Pertinent portions of this Act are reproduced in the Appendix as Appendix D.

STATEMENT OF THE CASE

Petitioner the University of Medicine and Dentistry of New Jersey is a statutorially-created institution of higher education established by the New

Jersey Legislature with the mandate to operate a program of medical and dental education which "shall be deemed to be public and essential governmental functions necessary for the welfare of the State and the people of New Jersey."

N.J.S.A. 18A:64G-3a (App.D at 111a).

Petitioners Board of Trustees of the University are appointed by the Governor of New Jersey with the advice and consent of the New Jersey Senate and are vested with the "government, control, conduct, management and administration of the university." N.J.S.A. 18A:64G-4a (App.D at 115a).

Respondent Anne Fuchilla, a former employee of the University, initially filed a complaint against the University, its Board of Trustees in their official capacities and her former

supervisor, Dr. William Layman, on September 3, 1982, while she was still employed by the University as a secretary (App.A at 6a). The complaint asserted various acts of sexual harassment and retaliation by Layman against Fuchilla and a failure by the University to take action to remedy those alleged acts (App.A at 5a to 6a). An amended complaint was filed on September 6, 1983 in which Fuchilla alleged, inter alia, that she had been fired in June 1983 in retaliation for her complaints of sexual harassment. In her complaint, Fuchilla asserted causes of action under New Jersey's Law Against Discrimination, N.J.S.A. 10:5-1 et seq., the federal Civil Rights Act, 42 U.S.C. § 1983 and Art. 1, ¶s 1 and 6 of the New Jersey Constitution (App.A at 2a to 6a).

The claims against William Layman were dismissed on February 19, 1985 as a result of a settlement reached and a release given in another matter pending between Fuchilla and Layman. Thereafter, the remaining defendants, the University and its Board of Trustees in their official capacities, moved to dismiss the complaint pursuant to the provisions of New Jersey's Tort Claims Act which controls the liability of public entities in New Jersey (App.A at 6a). A mandatory condition precedent for pursuing a claim against a public entity covered by the Act is the requirement of N.J.S.A. 59:8-8 which provides in pertinent part that

[a] claim relating to a cause of action for death or for injury to person or to property shall be presented as provided in this chapter not later than the ninetieth day after accrual of the cause of

action.... The claimant shall be forever barred from recovering against a public entity if:

a. He failed to file his claim with the public entity within 90 days of accrual of his claim except as otherwise provided in Section 59:8-9.... [App.C at 108a]

The trial judge held that all the claims asserted in plaintiff's complaint against the University and the Board were subject to the requirements of the Tort Claims Act and since Fuchilla had not filed a timely notice of claim he ordered the complaint dismissed (App.E, App.B at 85a).

On May 6, 1985 Fuchilla filed a Notice of Appeal to the Appellate Division from the order dismissing her complaint. In an opinion rendered on May 27, 1986 the Appellate Division reversed the trial Court's dismissal of

the complaint (App.B). The appellate court held that the notice of claim provision in the Tort Claims Act was not intended by New Jersey's Legislature to apply to claims of discrimination brought pursuant to the state Law Against Discrimination and therefore Fuchilla's failure to file a timely notice did not bar her claims under the Law (App.B at 86a to 92a). Similarly, the Appellate Division held that the notice of claim provision did not apply to federal claims brought pursuant to 42 U.S.C. § 1983 in state court and thus Fuchilla's "§ 1983 claim should not have been barred by her failure to file a timely notice-of-claim" (App.B at 101a).

The appellate court then addressed the issue of whether the University is a "person" subject to suit under 42

U.S.C. § 1983 (App.B at 93a to 96a). This issue had not been raised before the trial judge but was referred to in a footnote in the University's Appellate Division brief in which it was argued that, although not raised in the trial court motion based on the Tort Claims Act, the University is not a "person" for purposes of § 1983. The Appellate Division "elect[ed] to consider" the issue since "[i]t could provide a basis for sustaining the trial judge's action" (App.B at 93a). In a short paragraph the Court rejected the University's position, holding that the University "is a autonomous governmental agency rather than an alter ego of the State" and thus is a "person" within the meaning of 42 U.S.C. § 1983 (App.B at 95a).

Thereafter, on June 16, 1986 the University and its Board of Trustees filed a Notice of Petition for Certification to the Supreme Court of New Jersey. There were three issues raised in the Petition for Certification: whether the University is a "person" under 42 U.S.C. § 1983 and whether the notice of claim provisions of the Tort Claims Act apply to actions brought in state court pursuant to either the state Law Against Discrimination or the federal civil rights statute (App.A at 3a). Certification was granted on October 15, 1986. 105 N.J. 563, 523 A.2d 196 (1986). In a decision rendered on February 8, 1988, with two Justices joining in a concurring opinion, the Court affirmed the decision of the Appellate Division, holding that the University is a "person" subject to

suit under § 1983 and that the notice of claim requirements do not apply to discrimination suits brought pursuant to state law or § 1983 in state court (App.A at 3a).

The Court's holding that the notice of claim provisions do not apply to a state § 1983 action was premised on its conclusion that "barring a Section 1983 claim for failure to satisfy the notice provisions of the Act would permit state legislation to deny a federal right in violation of the Supremacy Clause" (App.A at 31a). Without any substantive analysis, the Court merely cited to a number of cases which held such notice provisions inapplicable to 1983 actions (App.A at 31a to 35a).

In concluding that the University is a "person" for purposes of 42 U.S.C.

1983, the Court below cited to federal decisions concerning whether a governmental entity is entitled to a state's Eleventh Amendment immunity (App.A at 15a to 18a). While the Court recognized that the Eleventh Amendment has no "direct effect" on state court proceedings, it reasoned that since 42 U.S.C. § 1983 was not intended to abrogate the states' Eleventh Amendment immunity, an "entity [that] enjoys immunity as the state or its alter ego" cannot be deemed a "person" for purposes of § 1983 (App.A at 12a, 14a). Conversely, the Court reasoned that "[i]f ... a governmental entity is not considered to be the 'state' for Eleventh Amendment purposes, ... a federal action may be maintained against it as a 'person' under Section 1983" (App.A at 13a).

Proceeding from this reasoning, the Court engaged in a flawed and cursory analysis of criteria developed by the Third Circuit Court of Appeals to determine whether a particular governmental entity is entitled to Eleventh Amendment immunity (App.A at 15a to 29a). In analyzing three of those criteria, the Court could reach no conclusion. Thus, it held that local law and decisions defining the status and nature of the agency in relationship to the state "is not helpful in resolving the issue" (App.A at 20a). The Court also held it to be "unclear whether [the University] is performing a governmental or proprietary function" and "inconclusive" as to whether the University has the power to sue and be sued (App.A at 23a, 28a). As to a fourth criteria, the degree of

autonomy the entity exercises over its operations, the Court merely listed various powers granted to the Board of Trustees by statute without any analysis as to whether those powers are consistent with an entity sharing in the State's immunity (App.A at 24a to 26a).

Despite its inability to resolve these issues, the Court below concluded that "[o]n balance ... the factors tip in favor of finding that [the University] is not the alter ego of the State for Eleventh Amendment purposes and, therefore, is liable as a 'person' under Section 1983" (App.A at 29a). The factor deemed almost dispositive in the Court's opinion is that for fiscal year 1985-86, the state appropriation to the University constituted 52.4% of its operating budget and "the balance of

[the University's] funds are derived from private sources, such as tuition fees or payments by patients at University Hospital" (App.A at 20a to 21a). Finding from this that the University could "satisfy any such judgment with funds from private sources," the Court concluded that the institution was not entitled to Eleventh Amendment immunity (App.A at 22a). In reaching this conclusion the State Supreme Court misconstrued federal law on this issue and all but ignored the significance of the Eleventh Amendment's grant of immunity. Moreover, as discussed infra, the state court's decision is in conflict with numerous decisions of the federal court of appeals which have found state universities immune from suit under the Eleventh Amendment. As recognized in those

cases, the question of immunity for public institutions of higher education raises unique issues which require a more sophisticated analysis than a mere percentage breakdown of the source of funding for the institution.

REASONS FOR GRANTING THE WRIT

THE HOLDING OF THE COURT BELOW THAT THE UNIVERSITY IS A PERSON SUBJECT TO SUIT UNDER 42 U.S.C. § 1983 RAISES SUBSTANTIAL QUESTIONS OF SIGNIFICANCE FOR PUBLIC INSTITUTIONS OF HIGHER EDUCATION AND CONFLICTS WITH DECISIONS OF VARIOUS FEDERAL COURTS OF APPEALS. THE HOLDING OF THE COURT BELOW THAT THE NOTICE PROVISIONS OF NEW JERSEY'S TORT CLAIMS ACT DO NOT APPLY TO § 1983 ACTIONS BROUGHT IN STATE COURTS CONFLICTS WITH A DECISION OF ANOTHER STATE COURT OF LAST RESORT TO WHICH THIS COURT HAS GRANTED CERTIORARI.

This petition presents several questions of substantial national importance regarding the potential liability of

public institutions of higher education under 42 U.S.C. § 1983 and the interplay between the federal statute and state Tort Claims Acts which require the filing of a notice of claim before suit may be maintained against a public entity. The cursory and flawed analysis undertaken by the Court below which led to its erroneous conclusion that the University is a "person" under Section 1983 and some conflicting decisions of the lower federal courts on the status of state universities under that statute can only cause uncertainty and confusion in future 1983 cases involving public institutions of higher education. Moreover, the decision below holding that the Supremacy Clause bars applicability of the State's Tort Claims Act to § 1983 actions brought in state court is in

direct conflict with the decision of the Supreme Court of Wisconsin in Fedler v. Casey, 139 Wis.2d 614, 408 N.W.2d 19, cert. granted, 108 S.Ct. 326 (Nov. 9, 1987) which is currently pending before this Court.

Review by this Court is thus appropriate in order to resolve these issues and to provide guidance to the lower federal courts and the state courts as to whether public universities are subject to suit under the Federal Civil Rights Act.

A.

CERTIORARI SHOULD BE GRANTED TO ESTABLISH UNIFORM FEDERAL CRITERIA FOR DETERMINING IF A PUBLIC INSTITUTION OF HIGHER EDUCATION MAY BE SUED UNDER 42 U.S.C. § 1983 IN EITHER FEDERAL OR STATE COURT.

The question of whether an entity is the alter ego of a state and thereby

immune from federal suit under the Eleventh Amendment is a question of federal, not state, law. Blake v. Kline, 612 F.2d 718, 722 (3d Cir. 1979), cert. den., 447 U.S. 921 (1979). Similarly, the related issue of whether that entity is a "person" for purposes of 1983 and thus suable in state court is a question of federal law. See Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658 (1978).* In rendering its decision below the Court erroneously decided the federal question in a manner which threatens to emasculate the Eleventh Amendment which

* Since the question of whether an entity is entitled to Eleventh Amendment immunity and the question of whether it is a "person" under 1983 are inter-related, see Quern v. Jordan, 440 U.S. 332 (1979), the above discussion will address those questions as substantially identical for purposes of this petition.

is intended to protect "the sovereignty of the states and the sanctity of their treasuries." Note, A Practical View of the Eleventh Amendment -- Lower Court Interpretations and the Supreme Court's Reaction, 61 Geo. L.J. 1473, 1474 (1973). As this Court has unequivocally stated, the Eleventh Amendment bars suit against state officials or agencies where the "state is the real, substantial party in interest." Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 101 (1984). Yet the decision below paid scant, if any, attention to the issue of whether the State of New Jersey is the real party in interest in this case.

The fundamental flaw in the decision below is in its emphasis on the source of revenues received by the University. The Court reasoned that since the University

has funds from private sources, such as tuition fees and payments from patients admitted to University Hospital, "the State will not be required to pay directly any judgment rendered against "the University (App.A at 22a). In the Court's view, any increase in appropriated funds made by the Legislature as a result of a judgment against the University would be "indirect" and thus the University could not be considered the alter-ego of the State for purposes of the Eleventh Amendment (App.A at 22a to 23a). This analysis completely fails to address the issue of who is the real party in interest as expounded by this Court in Pennhurst, supra. Indeed, the type of mechanistic analysis followed by the Court below would preclude almost all public institutions of higher educa-

tion from claiming the protection of the Eleventh Amendment.

The mere fact that a state university receives funds from sources other than direct state appropriation says nothing about whether the State is the real party in interest. This has been recognized by numerous decisions of the circuit courts of appeals which have held state universities immune from federal suit under the Eleventh Amendment. E.g., Kashani v. Purdue University, 813 F.2d 843 (7th Cir. 1987); Harden v. Adams, 760 F.2d 1158 (11th Cir. 1985); Hall v. Medical College of Ohio at Toledo, 742 F.2d 299 (6th Cir. 1984), cert. den. 469 U.S. 1113 (1985); Clay v. Texas Women's University, 728 F.2d 714 (5th Cir. 1984); Cannon v. University of Health Sciences/The Chicago Medical School, 710 F.2d 351

(7th Cir. 1983); Jackson v. Hayakawa, 682 F.2d 1344 (9th Cir. 1982); United Carolina Bank v. Board of Regents, 665 F.2d 553, 558 (5th Cir. 1982); Rutledge v. Arizona Board of Regents, 660 F.2d 1345 (9th Cir. 1981), aff'd sub nom. Kush v. Rutledge, 460 U.S. 719 (1983); Ronwin v. Shapiro, 657 F.2d 1071, 1073 (9th Cir. 1981); Perez v. Rodriguez Bou, 575 F.2d 21 (1st Cir. 1978); Martin v. University of Louisville, 541 F.2d 1171 (4th Cir. 1976); Jagandan v. Giles, 538 F.2d 1166 (5th Cir. 1976), cert. den. 432 U.S. 910 (1977); Prebble v. Broderick, 535 F.2d 605 (10th Cir. 1976); Long v. Richardson, 525 F.2d 74 (6th Cir. 1975); Brennan v. University of Kansas, 451 F.2d 1287 (10th Cir. 1971); Walstad v. University of Minnesota Hospitals, 442 F.2d 634 (8th Cir. 1971). But see Kovats v. Rutgers, The

State University, 822 F.2d 1303 (3d Cir. 1987); Goss v. San Jacinto Junior College, 588 F.2d 96 (5th Cir. 1979). As stated in Kashani v. Purdue University, supra, "[t]he vast majority of cases considering the issue have found state universities to be forfended by the Eleventh Amendment." 813 F.2d at 845; see also Hall v. Medical College of Ohio at Toledo, supra, 742 F.2d at 301. The circuit courts have held these universities to be immune even though they receive revenues from sources other than state appropriations. For example, in Kashani v. Purdue University, supra, the court held that the issue of immunity does not depend merely on the sources of funding or on whether the state treasurer will physically write out a check to pay any judgment. As stated therein, the

analysis must consider the entire relationship between the university and the State, since

If a judgment were awarded against Purdue, the state treasury would not write out a check to Kashani. But in view of the fact that Purdue is by design dependent on state appropriations, which are evidently carefully geared through close oversight to meet the changing financial needs of the university, it is apparent that the payment would directly affect the state treasury. Indiana has not created an entity with a separate financial basis; it has created one that is dependent upon and functionally integrated with the state treasury. [813 F.2d at 846]

The decision below thus conflicts with the decisions of most of the circuit courts which have decided the question of a state university's immunity. Indeed, the decision below completely ignored the

above-cited circuit court cases on this issue.

Had the Court properly analyzed the financial relationship between the University and the State of New Jersey, a clear linkage between appropriated and non-appropriated funds would have been found such that "the effect of ... any judgment against the school [would be] a liability payable from the state treasury." Hall v. Medical College of Ohio at Toledo, supra, 742 F.2d at 305. In order to ensure that the university is able to satisfy its "public and essential governmental functions necessary for the welfare of the State and the people of New Jersey" and, in recognition of the declared legislative finding that "it is the responsibility of the State to provide funds necessary to establish and

operate" medical education programs, N.J.S.A. 18A:64G-2, 3 (emphasis added), the State Legislature annually appropriates the money necessary to fund the difference between the University's total operating budget and all its anticipated revenues from tuition and other non-restricted receipts. See e.g. P.L. 1986, c. 41; P.L. 1985, c. 209 (State of New Jersey Appropriations Bills for Fiscal Year 1985-1986 and 1986-1987). Significantly, the Appropriations Bill provides that

"[a]ll general services income or hospital services income [of the University] in excess of the amounts hereinabove as income deductions, shall be credited to the General Fund and such excess income is appropriated therefrom for service improvements during fiscal year 1986-1987 and the subsequent fiscal year in the several component units of the University of Medicine and Den-

tistry of New Jersey, upon the request of the Board of Trustees thereof, subject to the approval of the Chancellor of Higher Education and the Director of the Division of Budget and Accounting. [P.L. 1986, c. 41, Account No. 5630-100-179650-50]

As in Hall v. Medical College of Ohio at Toledo, supra, the New Jersey Legislature thus permits the University to retain revenues rather than pay them into the treasury and then be appropriated back as needed "but it could just as easily amend that statute to require the converse." 742 F.2d at 304.

Thus, any judgment paid out of the University's operating budget, which includes both direct State appropriations and anticipated revenues derived from University functions, would directly impact on the State Treasury. Since all unrestricted revenues are considered by

the Legislature in determining the size of the direct appropriation, any payment from other sources of revenue while "not literally out of the general treasury ... would directly deplete the funds otherwise utilized by ... non-autonomous, nonprofit state agencies in performing their important governmental non-proprietary functions" and would accordingly be barred by the Eleventh Amendment. Wade v. Mississippi Co-op Extension Service, 424 F. Supp. 1242, 1256-1257 (N.D.Miss. 1976); see Hall v. Medical College of Ohio at Toledo, supra. The Court below, however, made no attempt whatsoever to analyze the financial relationship between the University and the State.

Moreover, the Court below failed to properly apply federal law in analyzing

other attributes of the University which compel the conclusion that it cannot be considered a "person" for purposes of Section 1983 since it is an arm of the state and thus entitled to Eleventh Amendment immunity.* Barely mentioned

* In unreported decisions, several federal district courts in New Jersey have held that the University is not a state agency for purposes of the Eleventh Amendment. In a brief oral opinion, immunity was denied in Mauriello v. University of Medicine and Dentistry of New Jersey, et al., Civ. No. 83-1569 (D.N.J. August 10, 1984), rev'd on other grounds, 781 F.2d 46 (3d Cir. 1986), cert. den. 107 S.Ct. 80 (1987), primarily because "it cannot be said with any certainty that any judgment in this case will be paid by the state rather than the University." Immunity was also denied in an oral opinion in Gona v. College of Medicine and Dentistry of New Jersey, Civ. No. 83-3832, primarily based on the earlier Mauriello decision. Three written decisions have subsequently denied immunity. Fuchilla v. Prockop, et al., Civ. No. 85-0693 (D.N.J. October 13, 1987);

(Footnote Continued On Following Page)

by the Court is the fact that all members of the Board of Trustees, with the exception of two ex officio without vote mem-

(Footnote Continued From Previous Page)

Cohen v. Board of Trustees, etc. et al., Civ. No. 85-3841 (D.N.J. June 27, 1986); Khalil v. University of Medicine and Dentistry, Civ. No. 86-1066, letter op. (D.N.J. Nov. 30, 1986), aff'd on other grounds without opinion 841 F.2d 1119 (3d Cir. 1988).

Fuchilla v. Prockop, et al. is a companion case to the instant matter in which the University and a different superior were named as defendants. All claims against defendant Prockop and some claims against the University were dismissed on defendants' motion. The remaining claims are pending in the District Court.

Should this petition be granted the transcripts of the above oral decisions and the written decisions will be provided as part of the record. As with the opinion of the Court below, the above-mentioned decisions failed to properly analyze the relationship between the State and the University.

bers, are appointed by the Governor of New Jersey with the advice and consent of the State Senate for a term of three years. N.J.S.A. 18A:64G-4a. The two ex officio members are gubernatorially appointed members of the Executive Branch of state government, the Chancellor of Higher Education and the Commissioner of Health. Ibid. The Governor also appoints the Chairman of the Board of Trustees. N.J.S.A. 18A:64G-4c. In contrast to the decision below, the Seventh Circuit Court of Appeals held it to be "[v]ery significant" that the majority of Purdue University's Board members are appointed by the Governor in holding that institution to be an arm of the State. Kashani v. Purdue University, supra, 813 F.2d at 847. Not even mentioned by the Court below is the statutory provision mandat-

ing that investment of all University funds must be performed by the Director of Investment within the state's Treasury Department and that the State Treasurer is designated the custodian of the University's investment funds. N.J.S.A. 18A:64G-8, 10. Also ignored by the Court is that expenditures of appropriated funds by the Board must be in accordance with the provisions of the State budget and appropriation acts of the Legislature and that compensation of the president, deans, administrative staff, and faculty members must be set in accordance with the State budget and appropriations acts of the Legislature. N.J.S.A. 18A:64G-6(f), (g) and (h). No mention is made below that the Legislature has prohibited the University from "granting ... undergraduate degrees or [expanding] its

graduate degree programs beyond the biomedical science fields now authorized," or that the establishment of any new program, educational department or school requires approval by the State Board of Higher Education and provision made by law for any additional expenditure resulting therefrom. N.J.S.A. 18A:64G-3.2; 18A:64G-6(r). Finally, the Court below ignored the fact that the University is created as a body corporate and politic within the State's Department of Higher Education, clearly an agency of the State, N.J.S.A. 18A:64G-3, and the fact that the Attorney General of the State of New Jersey is the attorney for the University, see N.J.S.A. 18A:64G-7.

Moreover, the University lacks the characteristics of traditional political subdivisions of the State which have been

denied immunity. The University fulfills a state-wide educational function, see N.J.S.A. 18A:64G-2, as opposed to a local school board whose activities do not extend beyond the local school district. Compare Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274, 280 (1977). Importantly, the University has no taxing authority, "a strong indication that an entity is more like an arm of the state than like a county or city." Kashani v. Purdue University, supra, 813 F.2d at 846.

The Court below ignored or gave little weight to all these significant indicia of state agency or "alter ego" status. Moreover, the factors it relied upon in deciding that the University does not share in the State's immunity have either been rejected as significant

factors in Eleventh Amendment analysis or should be rejected by this Court. For example, the Court cited the fact that the University is established as a "body corporate and politic" (App.A at 24a). Establishment as "a body corporate and politic," however, does not defeat Eleventh Amendment immunity. See Florida Department of Health and Rehabilitative Services, 450 U.S. 147 (1981) (Eleventh Amendment applicable even though Department was created as a "body corporate" with the capacity to sue and be sued); Gibson-Homans Co. v. New Jersey Transit Corp., 560 F. Supp. 110, 112, 114 (D.N.J. 1982) (New Jersey Transit entitled to Eleventh Amendment immunity even though created as a body corporate and politic with sue and be sued status). The Court also relied upon the fact that the Uni-

versity is authorized to borrow money for the needs of the University without obligating the State. N.J.S.A. 18A:64G-6(o) (App.A at 22a). While some federal courts have found the authority to borrow to be a significant factor in analyzing the immunity of a state university, see e.g., Gordenstein v. University of Delaware, 381 F. Supp. 718 (D.Del. 1974), other courts have rejected the contention that the authority to issue bonds, for example, defeats immunity. Kashani v. Purdue University, supra, 813 F.2d at 846; Hall v. Medical College of Ohio at Toledo, supra, 742 F.2d at 304; Selman v. Harvard Medical School, 494 F. Supp. 603, 615 (S.D.N.Y. 1980), aff'd 636 F.2d 1204 (2d Cir. 1980); see also Vaughn v. Regents of University of California, 504 F. Supp. 1349, 1354 n. 7 (E.D.Calif.

1981). As reasoned in Selman v. Harvard Medical School, supra, the fact that a University may borrow funds from time to time "does not negate the fact that the [University] is generally funded with public funds from the state treasury" and thus does not establish that the institution is not an arm of the state.

Another factor found significant by the Court below is N.J.S.A. 18A:64G-15 which provides that nothing in the Medical and Dental Education Act "shall be deemed or construed to create or constitute a debt, liability, or a loan or pledge of the credit, of the State of New Jersey." From this provision the Court incorrectly concluded that the State had immunized itself from judgments arising out of the operations of the University and that this immunization indicated that

the University is not an arm of the State. Firstly, the Court erroneously found such immunization to exist. Despite the language of N.J.S.A. 18A:64G-15 the State has taken responsibility for the tortious acts of the University and its employees within the scope of their employment pursuant to the New Jersey Tort Claims Act, see N.J.S.A. 59:2-2, and for contractual liabilities under New Jersey's Contractual Liability Act. N.J.S.A. 59:13-1. This fact was noted to the Court below yet the Court failed to consider the impact of the Tort Claims Act and the Contractual Liability Act in concluding that the State had immunized itself. More importantly for purposes of this petition, is the question whether N.J.S.A. 18A:64G-15 on its face is sufficient to preclude the Uni-

versity from sharing in the State's Eleventh Amendment immunity as held by the Court below. In Gibson-Homans, supra, the court rejected the argument that an identical provision in New Jersey Transit's enabling legislation precluded immunity. 560 F. Supp. at 113. The Court reasoned that the "substantial and continuing contribution of state money to New Jersey Transit's budget is a sufficiently direct effect on the state treasury to support a finding that New Jersey Transit is the alter ego of New Jersey" regardless of the provision in the enabling legislation quoted above. Id. at 114. The reasoning of Gibson-Homans is persuasive, particularly since "no single factor is controlling" in deciding the status of an agency. Ex Parte New York, 266 U.S. 490, 500 (1921).

The remaining factors relied upon the Court all concern express powers conferred upon the Board of Trustees in furtherance of their mandate to operate and govern the University. They include the power to contract, to acquire property by gift, purchase and condemnation, to make capital expenditures up to \$500,000, and to purchase without public bidding materials costing up to "\$12,500 or the amount determined by the Governor as provided herein." N.J.S.A. 18A:64G-6(1), (n)(1), (n)(2), (n)(3). The Court below merely cited these statutory provisions as supporting its conclusion without any analysis. However, as the Seventh Circuit cogently reasoned in Kashani v. Purdue University, supra, the grant of such powers does not support a conclusion that the institution is

independent from the State since independence "is undercut by the fact that the majority of the members of the Board itself are selected by the chief executive officer of the state and serve for a maximum of three years." 813 F.2d at 847. Moreover,

the functions granted the board appear less like the independent powers of a city or county than like the authority delegated to an instrumentality of the state to spare the legislature the need to ratify its every action. Also these powers are granted the university only so that it is able to carry out its primary purpose of education, in contrast to a city or county, whose exercise of such powers, in far more extensive form, is its very *raison d'etre*. [Ibid]

Through a cursory and flawed analysis, the Court below erroneously decided the important federal question of the extent to which a state university is

entitled to share in the state's federal immunities. As the cases cited above demonstrate, the extent of that shared immunity is a question that frequently arises and, while the majority of federal courts have decided in favor of immunity, other courts, by placing emphasis on different factors, have denied immunity. Kovats v. Rutgers, The State University, supra, Gordenstein v. University of Delaware, 381 F. Supp. 718, 722 (D.Del. 1974); Samuel v. University of Pittsburgh, 375 F. Supp. 1119, 1125-28 (W.D. Pa. 1974), aff'd in part, rev'd in part on other grounds 538 F.2d 991 (3d Cir. 1976). Of particular concern is the suggestion in the decision below and in Kovats v. Rutgers, The State University that a State's discretion in funding its universities is a significant factor in

deciding the immunity issue. The Court below reasoned that since the Legislature might not increase the University's appropriation as a result of a judgment against the University there is no direct effect on the State Treasury and thus no immunity (App.A at 22a to 23a); see also Kovats v. Rutgers, The State University, supra, 822 F.2d at 1309. Such reasoning will likely rule out immunity for most public institutions of higher education. Moreover, it ignores reality since no state is likely to allow the well-being of its public universities to be placed in jeopardy as a result of a substantial judgment. Rather, should a judgment rendered against a university which is fiscally dependent on the state threaten the institution's ability to satisfy its educational mandate, the

state, either directly or indirectly, will most likely ensure the institution's fiscal stability since the alternative would be the unpalatable one of sacrificing the educational needs of the state's citizens. That the state has the option of choosing that alternative, however, should have no bearing on whether the university is an arm of the State. If the decision below is allowed to stand not only will this University be exposed to improper liability prohibited by the Eleventh Amendment but other courts may adopt the flawed reasoning and thereby deny immunity to state universities throughout the nation. In view of the public importance and the significance of the issue presented, review by this Court is imperative.

B.

CERTIORARI SHOULD BE GRANTED TO REVIEW THE HOLDING BELOW THAT THE NOTICE OF CLAIM PROVISIONS IN NEW JERSEY'S TORT CLAIMS ACT DO NOT APPLY TO § 1983 ACTIONS FILED IN STATE COURT.

The Court's holding below that Fuchilla was not required to file a notice of claim pursuant to N.J.S.A. 59:8-8 prior to instituting her § 1983 action against the University in state court was predicated solely on its conclusion that the purposes underlying Section 1983 would be frustrated by imposing such a requirement (App.A at 31a). The Court, however, failed to adequately analyze the federal question involved and thus rendered an erroneous decision.

Liability for injuries by public employees and entities in New Jersey,

including the State and its agencies, is controlled by the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq. (App.C). The Act defines "injury" as "death, injury to a person, damage to or loss of property or any other injury that a person may suffer that would be actionable if inflicted by a private person." N.J.S.A. 59:1-3. A mandatory condition precedent for recovery against a public entity for any such injury is contained in N.J.S.A. 59:8-8 which requires that notice of a claim must be presented to the public entity no later than 90 days after the accrual of the cause of action. With an exception not pertinent to the instant matter, no suit may be maintained unless the plaintiff complies with the 90-day notice of claim requirement. N.J.S.A. 59:8-8. These notice provisions

serve an important state interest by providing public entities with a meaningful opportunity to timely investigate matters and, if appropriate, to settle claims early. Lloyd v. Stone Harbor, 432 A.2d 572, 179 N.J. Super. 496, 512 (Ch. Div. 1981); Mills v. County of Monroe, 59 N.Y.2d 307, 451 N.E.2d 456, 464 N.Y.S.2d 709 (1983), cert. den. 464 U.S. 1018 (1983).

The Court below did not expound upon its reasons for holding that the Supremacy Clause precluded requiring § 1983 claimants in state court to comply with the notice of claim provision but merely relied upon cited decisions of other state and federal courts (App.A at 32a). The decision below and the cases relied upon by the Court are in direct conflict with the decisions of the highest courts

of three states which found no federal impediment to imposing notice requirements. Indiana Dep't of Pub. Welfare v. Clark, 478 N.E.2d 699 (1985), cert. den. 106 S.Ct. 2893 (1986); Mills v. County of Monroe, supra; Fedler v. Casey, 139 Wis.2d 614, 408 N.W.2d 19, cert. granted, 108 S.Ct. 326 (Nov. 9, 1987). This Court has recognized the importance of the issue and in resolving the conflict by reviewing the decision in Fedler v. Casey, supra. As discussed below, the issue presented in this petition is substantially identical to the issue presented in Fedler v. Casey. In such circumstances, the instant petition should be granted so that this matter may be decided in accordance with Fedler. See, e.g., Keney v. New York, 388 U.S. 440 (1967).

In Fedler, plaintiff brought suit in state court pursuant to Section 1983 contending that his civil rights were violated when he was arrested and beaten by officers of the Milwaukee Police Department. The City of Milwaukee was named as one of the defendants and moved to dismiss the claim against it for failure to comply with the state notice statute which provides that no action may be brought or maintained against any governmental body unless a notice of claim is filed within 120 days of the happening of the event. 408 N.W.2d at 20. The Supreme Court of Wisconsin agreed that the notice provision was applicable to the 1983 action and that such application does not offend the federal policy underlying Section 1983. The Court reasoned that a litigant electing to

pursue a state remedy and avail himself or herself of state court resources should be required to abide with state court rules and procedures, including the notice of claim provision and that

[t]he remedial and deterrent purposes underlying Section 1983 actions are not frustrated simply because a state court litigant must abide by state court procedures. The notice of claim statute does not operate to limit the amount that a plaintiff might recover for a violation of his or her civil rights. Nor does the notice requirement operate to preclude a plaintiff's possibility for recovery. [408 N.W.2d at 25]

Similarly, in the instant matter there is nothing inconsistent with the federal policy underlying the cause of action created by 42 U.S.C. § 1983 if the notice provisions of the New Jersey Act are applied to such suits brought in state court. Such notice requirements do not

discriminate against federal claims in any manner. Rather, they are requirements applied to all tort actions against public entities and designed to provide the public entity with a timely opportunity to investigate claims and settle them without the expense of litigation. Applying such notice requirements is thus fully consistent with this Court's holding in Johnson v. Railway Express Agency, 421 U.S. 454 (1975), since Johnson precludes such application only when it "would be inconsistent with the federal policy underlying the cause of action under consideration" and such inconsistency is not found "merely because the statute causes the plaintiff to lose the litigation." Robertson v. Wegman, 436 U.S. 584 (1978).

In rejecting application of the notice provision, the Court below misconstrued federal policy in this regard. Certiorari should be granted to correct that misconception and to resolve the conflicting state court decisions.

CONCLUSION

For the above stated reasons, it is respectfully submitted that this petition for a writ of certiorari to the Supreme Court of New Jersey should be granted.

Respectfully submitted,

W. CARY EDWARDS
ATTORNEY GENERAL OF
NEW JERSEY

Attorney for Petitioners,
University of Medicine
and Dentistry of New
Jersey and the Board of
Trustees of the University
of Medicine and Dentistry
of New Jersey

By Barbara A. Harned
Barbara A. Harned
Deputy Attorney General

DATED: May 6, 1988

APPENDIX



APPENDIX A

SUPREME COURT OF NEW JERSEY
A-122 September Term 1986

ANNE FUCHILLA,

Respondent,

v.

WILLIAM A. LAYMAN, M.D.;
UNIVERSITY OF MEDICINE and
DENTISTRY of NEW JERSEY and
the BOARD OF TRUSTEES of the
UNIVERSITY OF MEDICINE and
DENTISTRY of NEW JERSEY,

Appellants.

Argued March 30, 1987 ---
Decided February 8 1988

On certification to the Superior Court, Appellate Division, whose opinion is reported at 210 N.J. Super. 574 (1986).

Barbara A. Harned, Deputy Attorney General, argued the cause for appellants (W. Cary Edwards, Attorney General of New Jersey, attorney; Andrea M. Silkowitz, Deputy Attorney General, of counsel).

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Maureen S. Binetti argued the cause for respondent (Wilentz, Goldman, & Spitzer, attorneys; James M. Burns, of counsel and on the brief).

The opinion of the Court was delivered by POLLOCK, J.

This appeal concerns the applicability of the notice provisions of the Tort Claims Act (the Act), N.J.S.A. 59:8-8, 9, to discrimination claims brought pursuant to the Civil Rights Act, 42 U.S.C.A. § 1983, and the New Jersey Law Against Discrimination (the Law), N.J.S.A. 10:5-1 to -42. Plaintiff, Anne Fuchilla, sued under both statutes, and the University of Medicine and Dentistry of New Jersey and its Board of Trustees (UMDNJ) moved to dismiss the complaint because of her failure to satisfy the

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notice provisions of the Act. The Law Division granted summary judgment in favor of UMDNJ, and the Appellate Division reversed and remanded. We granted certification, 105 N.J. 563 (1986), and now affirm the judgment of the Appellate Division.

We hold that UMDNJ is a "person" within the meaning of 42 U.S.C.A. § 1983 and, therefore, may be liable for Civil Rights violations under that statute. We hold further that sexual harassment does not constitute an "injury" within the meaning of the Act. Consistent with that conclusion, the notice provisions of the Act, N.J.S.A. 59:8-8, 9, do not apply either to injuries arising from violations of the Law or to a violation of federal rights protected by section 1983.

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Consequently, Fuchilla may maintain her causes of action under section 1983 and under the Law.

-I- 1

This matter is presented on UMDNJ's motion for summary judgment. Consequently, we assume that the facts as alleged by Fuchilla are true, and give her the benefit of all inferences that may be drawn in her favor. R. 4:46-2; Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 65 (1980). Because the matter is presented on review of an order for summary judgment, our decision does not reflect any view of the appropriate disposition at trial.

Fuchilla was employed as a secretary at UMDNJ from January 1965 until June

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1983, when UMDNJ terminated her employment. For most of the period of her employment, she was assigned to Dr. William A. Layman, but in July 1982, she began working for Dr. Darwin Prockop. While they were working together, Fuchilla and Dr. Layman engaged in an intimate relationship, which lasted until 1981. Between that date and the date of her transfer to Dr. Prockop, Fuchilla alleges that "Layman sexually harassed and intimidated plaintiff in the performance of her job functions and responsibilities, and retaliated against her for having terminated their intimate relations." She contends that the alleged acts of discrimination began on November 3, 1981, and lasted until either August or November of 1982.

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On September 3, 1982, while still employed by UMDNJ, Fuchilla instituted this action against UMDNJ, its trustees, and Dr. Layman. Insofar as UMDNJ is concerned, Fuchilla alleges that "[d]efendant UMDNJ has supported Layman in his continual sexual harassment actions and has failed to take any action or remedy to stop the discriminatory acts of defendant Layman." She claims that in November 1982 Dr. Prockop asked her to resign and that in June 1983 UMDNJ fired her. Fuchilla settled her claim against Dr. Layman for \$25,000, and on August 4, 1983, she filed a notice of claim with UMDNJ. She filed the notice, however, beyond the ninety-day period permitted by the Act, N.J.S.A. 59:8-8, 9, and the Law Division granted UMDNJ's motion to dismiss her complaint. In reversing, the

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Appellate Division ruled that the notice provisions of the Act did not apply to Fuchilla's claims under either the Law or 42 U.S.C.A. section 1983. The court also ruled that Fuchilla's claim for injunctive relief was not subject to the provisions of the Act, a ruling that UMDNJ does not challenge on this appeal.

During the pendency of this action, Fuchilla instituted a suit in the United States District Court for the District of New Jersey against Dr. Prockop and UMDNJ, Fuchilla v. Prockop, No. 85-0693 (D.N.J. Oct. 13, 1987). That court granted summary judgment dismissing the complete complaint against Prockop and granting partial summary judgment on Fuchilla's claims against UMDNJ based on substantive due process and equal protection, but not

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on her claims based on her free speech and liberty rights under the fourteenth amendment to the United States Constitution. The effect of that judgment on this action is not before us.

-II-

To be liable under 42 U.S.C.A. section 1983 (section 1983),* the defendant must be a "person" within the

* 42 U.S.C.A. section 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to

(Footnote Continued On Following Page)

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meaning of that section. The statute does not define "person," and in defining the term, the United States Supreme Court has looked to the eleventh amendment,* under which the individual states are not subject to the jurisdiction of the federal courts. Quern v. Jordan, 440 U.S. 332, 350-51, 99 S. Ct. 1139, 1150, 59 L.Ed.2d 358, 373 (1978) (Brennan, J., concurring). In Quern v. Jordan, ac-

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the party injured in an action at law, suit in equity, or other proper proceeding for redress.

* The eleventh amendment of the United States Constitution provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one

(Footnote Continued On Following Page)

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according to Justice Brennan's concurring opinion, the Supreme Court impliedly held that a state is not a "person" within the meaning of 42 U.S.C.A. section 1983. Id. at 350, 99 S. Ct. at 1150, 59 L.Ed.2d at 372; Bailey v. Ohio, 487 F. Supp. 601, 603 (S.D. Ohio 1980) ("[t]he fact that Congress did not intend 'to abrogate eleventh amendment immunity for the states means, necessarily, that a state is not a 'person' under § 1983 and no suit for any relief may be maintained against the state under § 1983"). Following that interpretation, a majority of state courts have held that an entity

(Footnote Continued From Previous Page)

of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

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considered to be a state or its alter ego for eleventh amendment purposes is not a "person" under section 1983. See State v. Green, 633 P.2d 1381 (Alaska 1981); Pyne v. Mease, 172 Cal. App.3d 392, 218 Cal. Rptr. 87 (1985); Merritt for State, 108 Idaho 20, 696 P.2d 871 (1985); Hampton v. Michigan, 144 Mich. App. 794, 377 N.W.2d 920 (1985); DeVargas v. State ex rel. N.M. Dep't of Corrections, 97 N.M. 447, 640 P.2d 1327 (Ct. App. 1981), cert. quashed, 97 N.M. 563, 642 P.2d 166 (1982); Edgar v. State, 92 Wash. 2d 217, 595 P.2d 534 (1979), cert. denied, 444 U.S. 1077, 100 S. Ct. 1026, 62 L.Ed.2d 760 (1980); Boldt v. State, 101 Wis. 2d 566, 305 N.W.2d 133, cert. denied, 454 U.S. 973, 102 S. Ct. 524, 70 L.Ed.2d 393 (1981); but see Ghumbir v. Kansas State Bd. of Pharmacy, 231 Kan. 507, 646 P.2d

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1078 (1982), cert. denied, 459 U.S. 1103, 103 S. Ct. 724, 74 L.Ed.2d 950 (1983); Lowery v. Department of Corrections, 146 Mich. App. 342, 380 N.W.2d 99 (1985); Ramah Navajo School Bd. v. Bureau of Revenue, 104 N.M. 302, 720 P.2d 1243 (Ct. App.), cert. quashed, 104 N.M. 201, 718 P.2d 1349, cert. denied, 107 S. Ct. 423, 93 L.Ed.2d 373 (1986). In the ten years that have elapsed since Quern v. Jordan, supra, the United States Supreme Court has not rejected Justice Brennan's interpretation. Furthermore, the parties rely upon that interpretation in the present case. In sum, if a governmental entity enjoys immunity as the state or its alter ego under the eleventh amendment, it cannot be liable as a "person" under section 1983. See Kovats v. Rutgers, 633 F. Supp. 1469, 1477 (D.N.J. 1986). Other-

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wise, section 1983, in effect, would abrogate the eleventh amendment. If, however, a governmental entity is not considered to be the "state" for eleventh amendment purposes, it is not immune from federal court jurisdiction, and a federal action may be maintained against it as a "person" under section 1983.

In the federal courts, a section 1983 action is subject to constraints not present in state courts. For example, the eleventh amendment limits the jurisdiction of federal, but not state, courts. Maine v. Thiboutot, 448 U.S. 1, 9 n.7, 100 S. Ct. 2507 n.7, 65 L.Ed.2d 555, 562 n.7. (1980), One effect of the eleventh amendment is to subject a state in a federal court to prospective injunctive relief, but not to a claim for

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damages. Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 Comp.Ed. 714 (1908). Because the present matter is pending in a state court, we are not concerned with eleventh amendment immunity as a defense or with the direct effect of that amendment on the proceedings. The determination whether UMDNJ may be considered to be the State under the eleventh amendment, however, is necessary to determine whether UMDNJ is a "person" within the meaning of section 1983. In urging us not to remand the matter but to resolve that issue, the Attorney General has supplemented the record with part of the appropriations handbook for fiscal year 1985-86. Resolution of the issue requires us to determine whether UMDNJ

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would be considered the alter ego of the State under the eleventh amendment. If so, it is not a "person" and, therefore, not liable under section 1983.

In determining whether an entity is an "alter ego" of the state for eleventh amendment purposes, the Third Circuit has adopted the following criteria:

[L]ocal law and decisions defining the status and nature of the agency involved in its relation to the sovereign are factors to be considered, but only one of a number that are of significance. Among the other factors, no one of which is conclusive, perhaps the most important is whether, in the event plaintiff prevails, the payment of the judgment will have to be made out of the state treasury; significant here also is whether the agency has the funds or the power to satisfy the judgment. Other relevant factors are whether the agency is performing a governmental or proprietary function; whether it has been separately incorporated; the degree

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of autonomy over its operations; whether it has the power to sue and be sued and to enter into contracts; whether its property is immune from state taxation, and whether the sovereign has immunized itself from responsibility for the agency's operations.

[Urbano v. Board of Managers of N.J. State Prison, 415 F.2d 247, 250-51 (3d Cir. 1969), cert. denied, 397 U.S. 948, 90 S. Ct. 967, 25 L.Ed.2d 129 (1970) (quoting Krisel v. Duran, 258 F. Supp. 845, 849 (S.D.N.Y. 1966), aff'd per curiam, 386 F.2d 179 (2d Cir. 1967), cert. denied, 390 U.S. 1042, 88 S.Ct. 1635, 20 L.Ed.2d 303 (1968) (footnotes omitted)).]

See Blake v. Kline, 612 F.2d 718, 722-26 (1979). Some federal courts have followed Urbano. E.g., Hall v. Medical College of Ohio at Toledo, 742 F.2d 299, 302-07 (6th Cir. 1984); Bowen v. Hackett, 387 F. Supp. 1212, 1220 (D.R.I. 1975). Other federal courts have cited Urbano with approval. E.g., Morrison-Knudsen Co. v. Massachusetts Bay Transp., 573

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F. Supp., 698, 703 (D. Idaho 1983); Martin v. Choudhuri, 563 F. Supp. 207, 210 n.2 (W.D. Wis. 1983); Henry v. Texas Tech Univ., 466 F. Supp. 141, 145 (N.D. Tex. 1979); Holley v. Lavine, 464 F. Supp. 718, 723 (W.D.N.Y. 1979).

Stated separately, the nine Urbano factors, as they are known, are: (1) local law and decisions; (2) whether, in the event plaintiff prevails, the judgment will have to be paid out of the state treasury; (3) whether the entity has the funds or the power to satisfy the judgment; (4) whether the entity performs a proprietary or a governmental function; (5) whether the entity has been separately incorporated; (6) the entity's degree of autonomy over its operations; (7) whether it has the power to sue and be sued and to enter into contracts; (8)

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whether the entity's property is immune from state taxation; and (9) whether the sovereign has immunized itself from responsibility for the entity's operations.

Turning to the application of the factors to UMDNJ, the Third Circuit has concluded that a section 1983 action may be maintained against UMDNJ. Mauriello v. University of Medicine & Dentistry, 781 F.2d 46 (3d Cir.), cert. denied, 107 S. Ct. 80, 93 L.Ed.2d 35 (1986). Nonetheless, the Attorney General directs our attention to English v. College of Medicine and Dentistry of N.J., 73 N.J. 20 (1977), to support his argument that UMDNJ is the alter ego of the State. English, however, was concerned not with eleventh amendment immunity, but with UMDNJ's right to discharge the supervisor

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of the morgue. Similarly, none of the other reported decisions involving the then College of Medicine and Dentistry, the predecessor of UMDNJ, involved the immunity of the College under the eleventh amendment. College of Medicine and Dentistry of N.J. v. Morrison, 141 N.J. Super. 104 (App. Div. 1976) (director of nursing is an employee-at-will subject to termination by College);, Rich v. State, 171 N.J. Super. 91, 93 (Law Div. 1979) (under predecessor statute, College is a state agency without power to sue and be sued, and suit for negligent scalding of patient was brought against State); De Angelis v. Addonizio, 103 N.J. Super. 238 (Law Div. 1968) (UMDNJ employees not entitled to Civil Service status). Furthermore, all these cases were decided before the 1981 amendments to the Medical

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and Dental Education Act, L. 1981, c. 325, which provided for "a greater degree of administrative autonomy" for UMDNJ, Senate Education Committee Statement Accompanying L. 1981, c. 325, a consideration that would diminish whatever persuasiveness might inhere in those decisions. From the foregoing, we conclude that "local law and decisions," the first Urbano factor, is not helpful in resolving the issue.

The most important consideration, represented by the second and third Urbano factors, is whether payment of any judgment against UMDNJ would be made from its funds or those of the State Treasury. Blake v. Kline, supra, 612 F.2d at 723; see also Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459, 464, 65 S. Ct. 347, 350, 89 L.Ed. 389, 394

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(1945) ("when the action is in essence one for the recovery of money from the state, the state * * * is entitled to invoke its sovereign immunity from suit"). According to the 1985-86 appropriations handbook, the total appropriation for UMDNJ was \$95,278,000, and the Attorney General informs us that according to the appropriations bill for that fiscal year, the appropriation constituted approximately 39% of UMDNJ's operating budget or 52.4% if payment of fringe benefits, payments in lieu of taxes, and debt service are included. The balance of UMDNJ's funds are derived from private sources, such as tuition fees or payments by patients at University Hospital. N.J.S.A. 18A:64G-6(e). Furthermore, the Medical and Dental Education Act expressly provides that

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none of its provisions "shall be deemed or construed to create or constitute a debt, liability, or a loan or pledge of the credit, of the State of New Jersey."

N.J.S.A. 18A:64G-15. From this, we conclude that the State will not be required to pay directly any judgment rendered against UMDNJ and that UMDNJ can satisfy any such judgement with funds from private sources. That conclusion does not deprecate the substantial funds appropriated by the State for UMDNJ, but "even significant state financial support will not necessarily encase an entity with eleventh amendment immunity." Blake v. Kline, supra, 612 F.2d at 724. Although the Legislature might increase the size of an appropriation because of the payment by UMDNJ of any judgment rendered against it, the indirect effect

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of that payment on the State Treasury is not sufficient to invoke eleventh amendment immunity. Id. at 726 (citing Edelman v. Jordan, supra, 425 U.S. at 668, 94 S. Ct. at 1358, 39 L.Ed.2d at 675).

As to the fourth Urbano factor, it is unclear whether UMDNJ is performing a governmental or proprietary function. The declaration in the authorizing legislation indicates that UMDNJ performs a governmental function. See N.J.S.A. 18A:64G-3 ("exercise by the university of the powers conferred by this act * * * shall be deemed to be public and essential governmental functions necessary for the welfare of the State and the people of New Jersey"); cf. Miller v. Rutgers, 619 F. Supp. 1386, 1391 (D.N.J. 1985) ("as an educational institution, Rutgers is performing a governmental * * * func-

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tion"). On the other hand, operating a medical school may be viewed as a proprietary activity often performed by private entities. In short, the nature of UMDNJ as a governmental or proprietary entity is unclear.

With respect to the fifth Urbano factor, the 1981 amendments to the enabling statute for the first time established UMDNJ as "a body corporate and politic." N.J.S.A. 18A:64G-3; Senate Education Committee Statement Accompanying L. 1981, c. 325. In respect of the sixth Urbano factor, which pertains to the autonomy of UMDNJ over its operations, the 1981 amendments further "declared [it] to be the public policy of the State that the university shall be given a high degree of self-government and that the government and conduct of the university

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shall be free of partisanship." N.J.S.A.
18A:64G-3.2. That autonomy is consistent
with UMDNJ's power to contract, N.J.S.A.
18A:64G-6(1); to acquire property by
gift, purchase and condemnation, N.J.S.A.
18:64G-6(n)(1); and to borrow money
without obligating the State, N.J.S.A.
18A:64G-6(o). The 1985 amendments, L.
1985, c. 514, also permitted UMDNJ to
purchase without public bidding services
and materials costing no more than
"\$12,500 or the amount determined by the
Governor as provided herein * * *."
N.J.S.A. 18A:64G-6(n)(2). In addition,
UMDNJ may make capital expenditures up
to \$500,000 without the approval of the
Board of Higher Education. N.J.S.A.
8A:64G-6(n)(3). The State retains some
control over UMDNJ in that the power of
the Board of Trustees to supervise the

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conduct of the University is subject to "general policies and guidelines set by the Board of Higher Education." N.J.S.A. 18A:64G-6. Except for the Chancellor of the Department of Higher Education and the Commissioner of Health, who serve ex officio, trustees are appointed by the Governor with the advice and consent of the Senate, and the Governor has the power to designate one of the voting members of the Board as its chairman. N.J.S.A. 18A:64G-4c.

Concerning the seventh Urbano factor, UMDNJ has the power to contract. N.J.S.A. 18A:64G-6(1). Not so clear, however, is UMDNJ's power to sue and be sued. See N.J.S.A. 18A:64G-3.4. The Attorney General contends that UMDNJ does not have such a power to sue and be sued. That contention become problematic, how-

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ever, upon considering that the Legislature has declared that the board of trustees has "in addition to the other powers and duties provided [in the Medical and Dental Education Act], * * * the powers, rights and privileges that are incident to the proper government, conduct and management of the university * * *," and that "such powers granted to the university or the board or reasonably implied, may be exercised without recourse or reference to any department or agency of the State, except as otherwise provided by this act. In addition, the board may retain independent counsel with the approval of the Attorney General." N.J.S.A. 18A:64G-7. Arguably, it would make little sense to authorize the Board to retain independent counsel if it could not sue and be sued, and the broad powers

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granted to the board include that power. This precise point has not been presented to us in sufficient detail, and without further exploration of the legislative history, we are reluctant to resolve the issue in this case. Hence, we find that the seventh Urbano, factor is inconclusive.

Turning to the eighth Urbano factor, UMDNJ, like other non-profit colleges and hospitals, is immune from taxation. N.J.S.A. 54:4-3.6. With respect to the ninth Urbano factor, the immunity of the State from the operations of UMDNJ, the statute authorizes UMDNJ to borrow money, N.J.S.A. 18A:64G-6(o), and, as previously indicated, the State is not responsible for sums borrowed by or judgments against UMDNJ, id.; N.J.S.A. 18A:64G-15.

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On balance, we find that the Urbano factors tip in favor of finding that UMDNJ is not the alter ego of the State for eleventh amendment purposes and, therefore, is liable as a "person" under section 1983.

Having made that determination, we now must decide whether plaintiff's failure to file a notice of claim within ninety days of the date of her injury as required by the Act, N.J.S.A. 59:8-8, 9, precludes her section 1983 claim. The Appellate Division held that the notice provisions of the Act do not apply to section 1983 actions and, therefore, do not bar plaintiff's claim based on section 1983. We agree. That conclusion follows from the interplay between the Act and section 1983.

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Pursuant to the Act, a person having a claim against a public entity must file a notice of claim with the entity within ninety days of accrual of the claim. N.J.S.A. 59:8-8a. A "public entity" includes "the State, * * * public authority, public agency, and any other political subdivision or public body in the State." N.J.S.A. 59:1-3. Failure to file a timely notice of claim bars the claimant from recovering against the public entity, N.J.S.A. 59:8-8a, except that within one year a judge of the Superior Court may permit late filing of the notice of claim, N.J.S.A. 59:8-9. UMDNJ, as "a body corporate and politic" within the Department of Higher Education, N.J.S.A. 18A:64G-3, is a "public entity" within the meaning of the Act. Consequently, claims against it are sub-

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ject to the notice requirement of the Act.

As a federal statute, however, section 1983 is entitled to the protection of the Supremacy Clause, article VI, of the United States Constitution, which precludes state laws that thwart the purposes of federal legislation. McGlynn v. New Jersey Pub. Broadcasting Auth., 88 N.J. 112, 137 (1981). Barring a section 1983 for failure to satisfy the notice provisions of the Act would permit state legislation to deny a federal right in violation of the Supremacy Clause. See T & M Homes, Inc. v. Township of Mansfield, 162 N.J. Super. 497 (Law Div. 1978). Accordingly, we hold that the notice provisions of the Act do not apply to plaintiff's section 1983 claims. See

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Lloyd v. Stone Harbor, 179 N.J. Super. 496 (Ch. Div. 1981).

This holding is in accord with the majority of out-of-state cases, which have held that the notice of claim provisions in their respective tort claims acts are inapplicable to actions brought pursuant to section 1983. See Williams v. Horvath, 16 Cal.3d 834, 129 Cal. Rptr. 453, 548 P.2d 1125 (1976); Mucci v. Falcon School Dist. No. 49, 655 P.2d 422 (Colo. App. 1982); Overman v. Klein, 103 Idaho 795, 654 P.2d 888 (1982); Tomas v. Universal Health Services, Inc., 145 Ill. App. 3d 663, 99 Ill. Dec. 451, 495 N.E.2d 1186 (1986); Spencer v. City of Seagoville, 700 S.W.2d 953 (Tex. App. 1985); Doe v. Ellis, 103 Wis.2d 581, 309 N.W.2d 375 (Wis. App. 1981). But see Fedler v. Casey, 139 Wis.2d 614, 408 N.W.2d 19,

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cert. granted, 108 S.Ct. 326 (Nov. 9, 1987); Indiana Dep't of Pub. Welfare v. Clark, 478 N.E.2d 699 (Ct. App. 1985), cert. den., 106 S.Ct. 2893, 90 L.Ed.2d 980 (1986); Mills v. County of Monroe, 59 N.Y.2d 307, 464 N.Y.S.2d 709, 451 N.E.2d 456, cert. denied, 464 U.S. 1018, 104 S.Ct. 551, 78 L.Ed.2d 725 (1983). The California precedents are particularly persuasive for our purposes because the New Jersey Tort Claims Act was patterned after the California Tort Claims Act of 1963. Kleinke v. Ocean City, 147 N.J. Super. 575, 579 (App. Div. 1977) (Citing Report of the Attorney General's Task Force on Sovereign Immunity at 10 (1972)) (Attorney General's Report). In Williams v. Horvath, supra, 16 Cal.3d at 457-58, 129 Cal. Rptr. at 841, 548 P.2d at 1129-30, the California Supreme Court reasoned

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that the purposes underlying section 1983 may not be frustrated by state substantive limitations couched in procedural language and that the supremacy clause will not permit such abrogation of a federal right.

Our holding is also consistent with the overwhelming majority of federal cases, which have uniformly refused to apply the state notice of claim requirement to actions brought pursuant to section 1983. Brown v. United States, supra, 742 F.2d at 1509; see cases cited id. at n.6; Gamel v. City of San Francisco, 633 F. Supp. 50 (N.D.Cal. 1986); Burroughs v. Holiday Inn, 621 F. Supp. 351 (W.D.N.Y. 1985); Williams v. Allen, 616 F. Supp. 653 (E.D.N.Y. 1985)); cf. Wilson v. Garcia, 471 U.S. 261, 279, 105 S. Ct. 1938, 1949, 85 L.Ed.2d 254,

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268 (1985) ("Congress * * * intended that the remedy provided in [42 U.S.C.A.] § 1983 be independently enforceable whether or not it duplicates a parallel state remedy" (citing Monroe v. Pape, 365 U.S. 167, 173, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961))). But see Cardo v. Lakeland Cent. School Dist., 592 F. Supp. 765 (S.D.N.Y. 1984) (federal case applying the state notice requirement).

-IV-

We now turn to the issue whether the notice provisions of the Act apply to plaintiff's claim under the Law. In holding that the notice provisions did not apply, the Appellate Division reasoned that the Law contains its own notice provisions and that the Legislature could not have intended that a discrimination claim be included within

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the coverage of the Act. Again, we agree. By declaring as a "civil right" that all persons shall have "the opportunity to obtain employment," N.J.S.A. 10:5-4, the Law prohibits employers from discriminating against employees because of their sex, N.J.S.A. 10:5-12(a). The term "employer" was amended in 1977 to include "the State * * * and all public officers, agencies, boards or bodies." N.J.S.A. 10:5-5(e). UMDNJ, therefore, is an employer within the meaning of the Law.

We acknowledge that the Legislature has not expressly described the relationship between the Act and the Law, and that the history of neither statute refers to the other. The Act does not specifically include discrimination, and the Law does not indicate that the Leg-

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islature intended discrimination to be treated as a tort. In the absence of a clear direction from the Legislature, another part of the Appellate Division concluded that acts of discrimination are included within the term "injury" as defined in the Act. Healey v. Township of Dover, 208 N.J. Super. 679, 682 (1986) (claims of sexual discrimination and harassment "fall within the expansive Tort Claims Act definition of 'injury' that includes 'injury to a person' and 'damage to or loss of property.'"). The Chancery Division, moreover, has concluded that a claim of sexual discrimination predicated upon the New Jersey Constitution is an "injury" under the Act. Lloyd v. Stone Harbor, supra, 179 N.J. Super. at 511-12. Additionally, one state supreme court has recognized a

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sexual harassment claim as a tort claim. Phillips v. Smalley Maintenance Servs., 435 So. 2d 705 (Ala. 1983) (employer's sexual solicitation constitutes a wrongful invasion of privacy.). Finally, the United States Supreme Court has also stated that a discrimination claim under section 1983 is a "tort action for the recovery of damages for personal injuries * * *." Wilson v. Garcia, supra, 471 U.S. at 275-77, 105 S.Ct. at 1947-48, 85 L.Ed.2d at 266-67.

Furthermore, we recognize that the Legislature intended that the Act would provide a comprehensive scheme for adjudicating tort claims against public entities. For example, in stating generally the immunity of public entities, the Legislature declared: "Except as otherwise provided by this [A]ct, a

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public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or public employee or any other person." Furthermore, N.J.S.A. 59:2-2, which provides for the liability of a public entity, states:

a. A public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances.

b. A public entity is not liable for an injury resulting from an act or omission of a public employee where the public employee is not liable.

"Injury" is broadly defined as: "death, injury to a person, damage to or loss of property or any other injury that a person may suffer that would be action-

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able if inflicted by a private person."

N.J.S.A. 59:1-3.

Notwithstanding the breadth of the definition, ambiguity lurks in the term "injury." Because we are concerned in the present case with the relationship between the Act and the Law, we must consult both statutes in addressing this ambiguity. To find the legislative intent behind a statute, particularly as it applies to a specific controversy, a court should consider the entire legislative scheme. Lott v. Mayor & Council of Borough of Franklin, 21 N.J. 274, 277-78 (1956); see, e.g., Terry v. Mercer County Freeholder Bd., 86 N.J. 141, 150-52 (1981) (legislative intent of both the Civil Service statutes and the Law relevant to determining whether a remedial promotion under the Law violated the

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Civil Service statutory "rule of three"). Thus, in the present case, we read the Act in the light of the Law. So viewed, the inquiry becomes whether the Legislature intended a discriminatory act allegedly committed by a public entity to be an injury subject to the notice requirements of the Act.

We begin by recognizing that the clear public policy of this State is to abolish discrimination in the work place. Indeed, the overarching goal of the Law is nothing less than the eradication "of the cancer of discrimination." Jackson v. Concord Co., 54 N.J. 113, 124 (1969). As the Legislature has declared, "discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and functions of a free democratic

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State." N.J.S.A. 10:5-3. The day is long past when an employee need endure discrimination because of his or her race, religion, national origin, or gender. Employment discrimination is not just a matter between employer and employee. The public interest in a discrimination-free work place infuses the inquiry. David v. Vesta Co., 45 N.J. 301, 327 (1965).

In contrast to the sweep of the Law, the Act seeks to provide compensation to tort victims without unduly disrupting governmental functions and without imposing excessive financial burden on the taxpaying public. See N.J.S.A. 59:1-2 (legislative declaration); N.J.S.A. 59:2-1 comment.

With their contrasting backgrounds in mind, we turn to the history, pur-

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pose, and text of each statute. As a historical matter, the Act is the legislative response to this Court's decision in Willis v. Department of Conservation & Economic Dev., 55 N.J. 534 (1970), which abrogated total governmental immunity from tort liability. According to the Act's stated purpose, it is "the public policy of this state that public entities shall only be liable for their negligence within the limitations of this Act." N.J.S.A. 59:1-2. That declaration pertaining to negligent conduct sheds little light on the Legislature's intention concerning discrimination, which depends on proof of motive or intent. Goodman v. London Metals Exch., Inc., 86 N.J. 19, 30 (1981) (proof of discriminatory motive or intent a crucial element of a discrimination case). Cf. Anderson

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v. Exxon Co., 89 N.J. 483 (1982) (motive to discriminate must be found objectively reasonable if it is to serve as a defense). The difference between the substantive standard for negligence, which was clearly a legislative concern in the Act, and the Law's implicit emphasis on motive or intent suggests that the Legislature did not intend that the Act apply to discrimination claims under the Law. In recognizing that difference, we need not determine whether the Act is limited to negligent conduct.

Consistent with its purpose of restricting governmental liability in tort, the Act provides that failure to notify a public entity within ninety days of accrual results in the bar of a tort claim. N.J.S.A. 59:8-8a. That relatively short time for filing was drafted

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to provide public entities with prompt notice so they could investigate and settle claims, N.J.S.A. 59:8-3 comment (a), and, thereby protect the public fisc.

Reflecting its concern with eliminating discrimination, the Law contains different procedural requirements. Under the Law, an aggrieved person may either file an administrative complaint with the Director of the Division on Civil Rights or file a civil action in the Superior Court. N.J.S.A. 10:5-13; see Sprague v. Glassboro State College, 161 N.J. Super. 218, 225 (App. Div. 1978). Once the aggrieved party files a Superior Court action, however, he or she may not file an administrative complaint with the Division during the pendency of the suit. N.J.S.A. 10:5-13, 27; Assembly Judiciary,

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Law, Public Safety and Defense Committee Statement Accompanying L. 1979, c. 404. Likewise, if the complainant first files with the Division, he or she may not file a complaint with the Superior Court while the administrative action is pending. See Hermann v. Fairleigh Dickinson Univ., 183 N.J. Super. 500, 504-05 (App. Div.), certif. denied, 91 N.J. 573 (1982).

The Law contains its own procedural requirements for filing pleadings, N.J.S.A. 10:5-13, 16; notice to the Division and parties, N.J.S.A. 10:5-13; 15; conciliation, N.J.S.A. 10:5-14; and time limitation on actions, N.J.S.A. 10:5-18. In particular, the Law requires that a complaint must be "filed within 180 days after the alleged act of discrimination." Id. These procedural provisions pertain only to administrative

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actions before the Division, see N.J.A.C. 13:4-1.1 to :12 (regulations applicable only to administrative remedy), and, contrary to the implication of the Appellate Division, 210 N.J. Super. at 579, do not apply to civil actions in the Superior Court. The Law contains no limitations or other procedural requirements for claimants who elect to proceed in the Superior Court. Additionally, the 1977 amendment extending the definition of "employers" to include public entities, N.J.S.A. 10:5-5(e), reflects the Legislature's intention to subject those entities to the procedures of the Law.

Yet another difference between the two statutes is the manner in which each addresses damages. The Act prohibits the award of damages for pain and suffering, except "in cases of permanent loss of a

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bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of \$1,000.00" N.J.S.A. 59:9-2(d). That limitation "reflects the policy judgment that in view of the economic burdens presently facing public entities a claimant should not be reimbursed for non-objective type of damages, such as pain and suffering, except in aggravated circumstances * * *." Id. at comment; Attorney General's Report, supra, at 17. Consequently, a claimant may not recover under the Act for "the intangible, subjective feelings of discomfort that are associated with personal injuries." Ayers v. Jackson Township, 106 N.J. 557, 571 (1987).

By comparison, the Law does not prohibit damages for pain and suffering.

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Awards under the Law are intended to serve not only the interest of the individual involved but "it is plain that the public interest is also involved." Jackson v. Concord Co., supra, 54 N.J. at 124-25. This Court has approved the administrative interpretation of the law by the Director of the Division on Civil Rights to permit so-called "humiliation damages." Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399, 415-16 (1973); Goodman v. London Metals Exch., Inc., supra, 86 N.J. 24. Although such damages are "incidental," they are not circumscribed by the same requirements pertaining to the recovery of pain and suffering damages under the Act. Arguably, therefore, the Legislature contemplated different treatment for the humiliation and pain and suffering of

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discrimination victims than that provided by the Act.

Our reading of the history, purpose, and provisions of the two acts leads us to conclude that the Legislature did not intend that claims of discrimination be subject to the notice requirements of the Act. We do not hold, or even suggest, that the Legislature may not include discrimination claims within the Act. We conclude only that the Legislature has not yet done so. In sum, the notice requirement of the Act does not apply to plaintiff's claims of discrimination against UMDNJ under either section 1983 or the Law.

The judgment of the Appellate Division is affirmed, and the matter is remanded to the Law Division.

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JUSTICES O'HERN, GARIBALDI, AND STEIN join in this opinion. JUSTICE HANDLER has filed a separate concurring opinion in which JUSTICE CLIFFORD joins. CHIEF JUSTICE WILENTZ did not participate.

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SUPREME COURT OF NEW JERSEY
A-122 September Term 1986

ANNE FUCHILLA,

Respondent,

v.

WILLIAM A. LAYMAN, M.D.;
UNIVERSITY OF MEDICINE and
DENTISTRY of NEW JERSEY and
the BOARD OF TRUSTEES of the
UNIVERSITY OF MEDICINE and
DENTISTRY of NEW JERSEY,

Appelants.

HANDLER, J., concurring.

In this case, the Court affirms the judgment of the Appellate Division upholding plaintiff's right to bring an unlawful gender discrimination complaint against the University of Medicine and Dentistry (UMDNJ) unencumbered by the

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restrictions of the New Jersey Tort Claims Act.

I join in this determination of the Court, but write separately to express more emphatically the view that the result reached by the Court not only accommodates the legislative intent underlying both the Law Against Discrimination and the Tort Claims Act, but futher, this result clearly advances our strong public policy in maximizing protections against invidious discrimination.

I.

A convenient point of embarkation for an analysis of this issue is the language of the Tort Claims Act. The primary focus of the Act is on negligence and similar tortious conduct impliedly involving fault. The legislative declara-

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tion of the Act states that "it is hereby declared to be the public policy of this state that public entities shall only be liable for their negligence within the limitations of this act..." N.J.S.A. 59:1-2 (emphasis added). Elsewhere the Act refers to a "negligent or wrongful act." N.J.S.A. 59:3-9; 59:4-2a. N.J.S.A. 59:9-2b, for example, provides that "[n]o judgment shall be granted against a public entity or public employee on the basis of strict liability, implied warranty, or products liability."* The

* For example, the treatment of nuisance actions against the state under the Act supports the view that the Legislature was primarily concerned with addressing negligence actions when it drafted the Tort Claims Act. The Court has held that public entity liability for nuisance is recognized under the Tort Claims Act,

(Footnote Continued On Following Page)

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notion that the Act is concerned essentially with tortious conduct involving fault in the sense of a want of reasonable care is also indicated by the Act's exclusion of public entity liability for

(Footnote Continued From Previous Page)

see Birchwood Lakes Colony Club v. Medford Lakes, 90 N.J. 582, 593 (1982). Its decision in that case was strongly influenced by N.J.S.A. 59:4-2, the section concerning liability for the condition of public property. This section, with its "palpably unreasonable" standard, noted by the Court, see id. at 594, in effect immunizes a public entity from nuisance damages unless the public entity was "negligent" -- that is, "palpably unreasonable" -- in failing to correct the dangerous condition. It should also be noted that the Comment to N.J.S.A. 59:4-2 indicates that the section "comports generally with the principles of liability established by the New Jersey courts for local public entities in their capacity as landowners," and pre-Tort Claims Act authority indicates that nuisance actions against local entities were de-

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certain kinds of intentional torts. N.J.S.A. 59:2-10 provides that public entities are not liable for the acts or omissions of employees "constituting a crime, actual fraud, actual malice, or willful misconduct."

In light of these provisions, I have little doubt -- perhaps less than the Court -- that the Legislature did not intend to include unlawful discrimination violative of the Law Against Discrimination as an "injury" to be governed by the Act. Fault or lack of reasonable care, which are the basis of "negligence," are generally not essential in determining

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pendent on negligence. Milstery v. City of Hackensack, 6 N.J. 400, 406, 409-12 (1951).

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whether conduct constitutes invidious discrimination that is unlawful under the Law Against Discrimination. Moreover, such unlawful discrimination frequently entails purposeful, willful, or intentional conduct. As noted, a claim brought under the Act that is based on intentionally tortious conduct of an employee would not render the public entity vicariously liable, N.J.S.A. 59:2-10, this notwithstanding the offending employee would be personally liable, N.J.S.A. 59:3-14. As the Appellate Division observed:

We note also, that the Tort Claims Act provides no immunity for willful or malicious acts caused either by the employee or the entity itself. The Tort Claims Act in N.J.S.A. 59:3-14a and b permits personal liability and full recovery against a public employee for the results of actual malice or willful misconduct. N.J.S.A. 59:2-

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10 forbids only vicarious liability for such conduct on the part of a public entity. Discriminatory conduct actionable under the Law Against Discriminatory is more akin to the malicious or willful acts exempted from the Tort Claims Act than the negligently or similarly inflicted injuries covered thereby.

[210 N.J. Super. at 579]

Moreover, if the Act were to apply, it would preclude the imposition of vicarious liability on public entity employers for unlawful discrimination under the Law. Cf. N.J.S.A. 59:2-10 (a public entity is not exonerated for injury resulting from its own negligence or intentional misconduct.). A result that would immunize the public entity and stigmatize only the public employee for invidious discrimination would clearly be at variance with the Law Against Discrimination. To the extent public

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entities would be immunized under the Act from the consequences of discriminatory conduct of its employees, it is clearly out of sync with prevailing law. Under Title VII, the analogous federal statute, compare 42 U.S.C. §2000e-2(9) with N.J.S.A. 10:5-12a, which is often looked to in interpreting the Law Against Discrimination, see Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 81 (1978), the doctrine of respondeat superior is an integral part of the protection provided by the statutory scheme. Employers are held strictly liable for the discriminatory employment decisions of their supervisory personnel. See, e.g., Flowers v. Crouch-Walker Corp., 552 F. 2d 1277, 1282 (7th Cir. 1977); E.E.O.C. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(c) (1985) (employer lia-

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ble for sexual harassment by supervisory employees regardless of whether the employer knew or should have known of its occurrence).^{*} In fact, awards on the grounds of respondeat superior or vicarious or derivative liability against employers whose employees' actions violate the Law have long been recognized. See, e.g., Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399, 405 (1973).

* Although the United States Supreme Court has declined to adopt this standard and impose absolute liability in all cases of supervisor sexual harassment, it has also rejected the notion that absence of notice is an absolute defense for the employer, and has called for the determination of employer liability to be governed by general agency principles. Meritor Sav. Bank v. Vinson, 477 U.S. 57, ___, 106 S.Ct. 2399, 2408, 91 L.Ed. 2d 49, 63 (1986). (A four justice concurrence would have adopted the E.E.O.C. guidelines. See id. at ___, 106 S.Ct. at 2409, 91 L.Ed. 2d at 64 (Marshall, J., concurring)).

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A result that drastically reduces responsibility for discrimination and so restricts the protection otherwise afforded its victims is strongly indicative of a legislative intent to exclude under the definition of the term "injury" in the Act unlawful discriminatory conduct. See Firestone v. Fritz, 119 Ill. App. 3d 685, 75 Ill. Dec. 83, 456 N.E. 2d 904, 908 (1983) (the Illinois Tort Immunity Act applies only to tort actions, not civil rights actions); cf. Union Free School Dist. No. 6 v. New York State Human Rights Appeal Bd., 35 N.Y. 2d 371, 380-81, 362 N.Y.S. 2d 139, 145, 320 N.E. 2d 589, 662-63 (1974), reh. den., 36 N.Y. 2d 807, 369 N.Y. 2d 1026, 330 N.E. 2d 657 (1975) (notice of claim was not required for action based on sex discri-

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mination because of public interest exception to notice requirement).

I find especially significant the history of the Tort Claims Act. This further underscores the notion that the Legislature intended to govern redress only for negligence and similar tortious wrongdoing and not for unlawful discrimination. The Act was a legislative response to the Court's abrogation of the State's tort sovereign immunity in Willis v. Department of Conservation and Economic Dev., 55 N.J. 534 (1970). In Willis, the Court reviewed previous judicial limitations on the use of sovereign immunity as a defense. It is instructive to note that all of the cases cited involve claims of ordinary negligence. Willis, 55 N.J. at 540. The most common type of claim at issue were

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simple slip and fall cases, see Amelchenko v. Borough of Freehold, 42 N.J. 541 (1964); Hayden v. Curley, 34 N.J. 420 (1961); Schwartz v. Borough of Stockton, 32 N.J. 141 (1960); Taylor v. New Jersey Highway Auth., 22 N.J. 454 (1971); Milstrey v. City of Hackensack, 6 N.J. 400 (1951), and most of the others involved allegations that governmental negligence created conditions that resulted in death or injury. See Miehle v. Darpino, 53 N.J. 49 (1968); Bergen v. Koppenal, 52 N.J. 478 (1968); B.W. King Inc. v. Town of West New York, 49 N.J. 318 (1967); Visidor Corp. v. Borough of Cliffside Park, 48 N.J. 214 (1966); Fitzgerald v. Palmer, 47 N.J. 106 (1966); Goldberg v. Housing Auth. of the City of Newark, 38 N.J. 578 (1962); Cloyes v. Delaware Township, 23 N.J. 324 (1957); Kress v. City of Newark,

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8 N.J. 562 (1952); Hartman v. City of Brigatine, 42 N.J. Super. 247 (App. Div. 1956), aff'd, 23 N.J. 530 (1957). Other cases involved situations where negligent supervision on the part of government officials led^r to the injury of third persons. Jackson v. Hankinson, 51 N.J. 230 (1968); Titus v. Lindberg, 49 N.J. 66 (1967); McAndrew v. Mularchuk, 33 N.J. 172 (1960); Peer v. City of Newark, 71 N.J. Super. 12 (App. Div. 1961), certif. den., 36 N.J. 300 (1962). These cases represent not only the background against which the Legislature acted when it drafted the Act, but many of them also stood for particular propositions of law, which the Legislature incorporated into the Act. See, e.g., Comment to N.J.S.A. 59:2-2, 59:2-3 (specific incorporation of the positions adopted by the Court in

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McAndrew, Amelchenko and Bergen); see also Miehl v. Darpino, supra, N.J. 49 (acknowledging existence of common-law immunity for tortious snow removal). None of these cases involved anything more than ordinary negligence.*

* The Legislature also looked to California, which had also judicially abrogated sovereign immunity, when it drafted New Jersey's Tort Claims Act. Muskopf v. Coring Hosp. Dist., 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P. 2d 457 (1961), in which the California Supreme Court abrogated that state's sovereign immunity, involved a suit by a patient injured due to the negligence of hospital employees. The only other California case discussed by the Attorney General's Report is Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 11 Cal. Rptr. 97, 359 P. 2d 465 (1961), decided on the same day as Muskopf, in which the California Court refused to impose liability. Lipman thus was available to both the California and (later) New Jersey legislatures as a guide to how the scope of a tort claims act could be limited. Lipman involved a case in which

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This history sheds a clear light on the purpose of the Tort Claims Act. It was to remedy the haphazard, costly, and inconsistent approach to governmental liability. See Report of the Attorney General's Task Force on Sovereign Immunity 11 (1972). It bears iteration that

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a school district superintendent alleged that members of the school board, while acting in their official capacity, maliciously engaged in conduct for the purpose of discrediting her reputation and forcing her out of her job. It is thus the closest analog to a discrimination/harassment suit that is discussed in the Attorney General's Report. In Lipman the court ruled that the alleged acts of the board fell within a discretionary exception to the general rule of liability. Report of the Attorney General's Task Force on Sovereign Immunity, 81-82 (1972). The case, I emphasize, did not involve a claim of constitutional or statutory discrimination and does not in the slightest suggest that such a claim could not be brought against a public entity.

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none of the plethora of judicial decisions that form the matrix of the Tort Claims Act involved a violation of a civil right. Quite clearly the Tort Claims act was not needed to structure liability -- or immunity -- for such claims.

In this case, in ascertaining legislative intent, a consideration of the purposes and goals of both statutes -- the Law Against Discrimination and the Tort Claims Act -- is essential. Fuchilla v. Layman, 210 N.J. Super. 574, 579 (App. Div. 1986). The objectives of the Law Against Discrimination are markedly different from those of the Tort Claims Act. As observed by the Appellant Division: "The Law Against Discrimination is directed at ending discrimination in employment and public accommodations

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while the Tort Claims Act provides liability for damages for the negligence of public entities." Id. at 578.

These contrasting legislative goals are manifest in very different statutory schemes. Awards under the Law Against Discrimination "are intended to serve not only the interest of the individual involved but the public interest as well." Jackson v. Concord Co., supra, 54 N.J. at 124-25. Awards for personal mortification can be made under the Law because compensation for the victim's humiliation is "reasonably calculated to eliminate the effects of discrimination." Zahorian v. Russell Fitt Real Estate Agency, supra, 62 N.J. at 416 (quoting Williams v. Jones, 4 Or. App. 482, 479 P. 2d 513 (1971)) (interpreting an Oregon antidiscrimination statute similar to

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that of New Jersey). Such awards have long been awarded in judicial actions, see, e.g., Gray v. Serruto Builders, 110 N.J. Super. 297, 317 (Ch. Div. 1970), and in administrative actions under the Law, see, e.g., Zahorian v. Russell Fitt Real Estate Agency, supra, 62 N.J. at 43-16; and such exemplary damages have been awarded even against public entity defendants. See, e.g., Roberts v. Keanburg Bd. of Educ., 5 N.J.A.R. 208, 268 (Adm. 1983).

The Act disavows any remedial purpose to vindicate societal interests or to rectify public or governmental misconduct or to protect any individual constitutional interest or civil right. It thus expressly prohibits exemplary or punitive damages under the Act. N.J.S.A. 59:9-2c. The Act eschews compensation

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for pain and suffering of the tort victim. N.J.S.A. 59:9-2d. This limitation on pain and suffering was intended to prevent compensation for "the intangible subjective feelings of discomfort that are associated with personal injuries[,]" Ayers v. Jackson Township, 106 N.J. 557, 571-72 (1987), reflecting a judgment that "in view of the economic burden presently facing public entities a claimant should not be reimbursed for non-objective type of damages...." Report of the Attorney General's Task Force on Sovereign Immunity, supra at 234.

The Act thus ignores what the Law seeks to prevent. The Law Against Discrimination is solicitous of the hurt endured by a victim of discrimination. It is designed so that no citizen shall

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be subject to the embarrassment and humiliation of discrimination. See, e.g., Evans v. Ross, 57 N.J. Super. 223, 231 (App. Div.), certif. den., 31 N.J. 292 (1959). In stark and dramatic opposition to the purposes of the Tort Claims Act, the philosophy and spirit of remedial awards available under the Law Against Discrimination are "fine-tuned to the nuances of discrimination and the psychological as well as economic suffering it causes." Castellano v. Linden Bd. of Educ., 79 N.J. 407, 417 (1979) (Handler, J., concurring in part and dissenting in part).

Distinctive substantive standards, as well as procedural rules, have been developed in the litigation of a claim under the Law Against Discrimination to advance its special goals of combatting

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discrimination. To reduce what otherwise might be an "insuperable burden" of proving discriminatory motive or intent, see Goodman v. London Metal Exch. Inc., 86 N.J. 19, 30 (1981), courts under the Law have borrowed procedures developed in litigation under federal antidiscrimination statutes. See, e.g., Peper v. Princeton Univ. Bd. of Trustees, supra, 77 N.J. at 81 (adopting procedures formulated in McDonnell-Douglas v. Green, 411 U.S. 792, 83 S.Ct. 1817, 36 L.Ed. 2d 668 (1973), in litigation under Title VII, 42 U.S.C. §2000e (1982)); Giammario v. Trenton Bd. of Educ., 203 N.J. Super. 356, 361 (App. Div. 1985) (looking to application of the Age Discrimination in Employment Act, 29 U.S.C. §621 to §634 (1982)). These standards aid the victims of age or sex discrimination under the

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Law by creating a presumption of invidious motive or intent if the claimant can show that an employment practice of the employer has a significant discriminatory impact. See, e.g., Goodman, supra, 86 N.J. at 30; Peper, 77 N.J. at 84; see also Anderson v. Exxon Co., supra, 89 N.J. 483, 499-500 (1982) (in handicap discrimination cases, motive or intent is presumed on a showing that the claimant is handicapped but capable of doing the job, thus shifting to the employer the burden of justifying his treatment of the claimant).

These substantive liability standards under the Law Against Discrimination are totally at odds with the deference to governmental discretion that serves as a cornerstone for the scheme of liability established by the Tort Claims Act. For

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example, N.J.S.A. 59:2-3 excludes most discretionary decisions from any judicial review, N.J.S.A. 59:2-3a-c, and tests the validity of the rest against a "palpably unreasonable" standard, N.J.S.A. 59:2-3d, a standard at variance with the substantive principles of law that govern a claim of unlawful discrimination. See Flanders v. William Patterson College of New Jersey, 163 N.J. Super. 225, 229-31 (App. Div. 1976) (an objectively reasonable decision granting tenure to the younger of two candidates could be struck down under the Law Against Discrimination); see also Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 11 Cal. Rptr. 97, 359 P. 2d 465 (1961) (claims of malicious harassment in employment under California law fall within

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discretionary-exception from liability of public entity).

It follows from this analysis and comparison of different goals, substantive standards, procedural rules, and remedial provisions that an interpretation of the Law that requires the superimposition of the Tort Claims Act to claims of unlawful discrimination would be wholly inconsistent with the intent of the Legislature when it provided expressly for suits under the Law to be brought in Superior Court. N.J.S.A. 10:5-13 was amended in 1979 expressly to authorize suits to be brought initially in Superior Court. L. 1979 c. 404, §1. This codified and strengthened the existing common-law practice of allowing judicial actions to vindicate this statutory civil right. See, e.g., Gray v.

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Serruto Builders, supra, 110 N.J. Super. at 305-11. According to the Governor's Statement, a purpose of this amendment is to "reduce the backlog of cases and the costs in the Division of Civil Rights." Governor's Statement on signing 'S-3101 (L. 1979 c. 404 § 1). There is no dispute that this amendment was intended to enhance the option of a civil suit. Consequently, any interpretation of the Law that makes the initiation of discrimination suits in Superior Court less attractive than administrative proceedings before the Division on Civil Rights must be viewed as a disincentive, frustrating the intended effect on the 1979 amendment.

Application of the Act's ninety-day notice provision would certainly have the effect of making Superior Court suits a

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less attractive option. Under the Law, a complainant has 180 days from the time of the alleged discrimination to file an administrative complaint. N.J.S.A. 10:5-18. If the ninety-day notice provision of the Act is read to apply to suits under the Law, any complainant who, for the financial, educational, or social reasons noted in David v. Vesta Co., supra, 45 N.J. at 327, had failed to file a notice to claim within ninety days would be forced back into the same overburdened administrative system the 1979 amendment was intended to relieve. Not only is the individual claimant barred from redress, the public interest in eradicating invidious discrimination is disserved.

It cannot be overstated that under the Law the Legislature has provided a wide assortment of remedial weapons of

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combat discrimination. A complainant has the option of either filing an administrative complaint with the Director of the Division on Civil Rights or filing a civil action with the Superior Court. N.J.S.A. 10:5-13, 27; see Sprague v. Glassboro State College, 161 N.J. Super. 218, 225 (App. Div. 1978). These several remedies are not antithetical but complementary. While a claimant may pursue only one remedial route at a time, he or she may seek alternative or successive vindication. See, e.g., Herman v. Fairleigh Dickinson Univ., 183 N.J. Super. 500, 504-05 (App. Div.), certif. denied, 91 N.J. 573 (1982).

Judicial actions to enforce the civil right to be free from discrimination are created to provide something in addition to what is provided by the

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administrative remedy. Christian Brothers Inst. v. Northern New Jersey Interscholastic League, 86 N.J. 409, 415 (1981) (discrimination claims have alternative state statutory and constitutional and federal statutory and constitutional remedies); see also Lally v. Copygraphics, 85 N.J. 668, 672 (1981) (penal and administrative remedies based on retaliatory firing for the filing of workers compensation claims augmented by judicial remedy for retaliatory discharge). The prevailing assumption is that the relief provided in the civil action will at least be as great as, or comparable to, available administrative remedies. See Zahorian v. Russell Fitt Real Estate Agency, supra, 62 N.J. at 417 n. 1 (Hall, J., dissenting); Peper v. Princeton University, supra, 151 N.J.

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Super. 15, 23, aff'd 77 N.J. 55, and
Gray v. Serutto Builders, supra, 110
N.J. Super. at 306-07.

II.

Any interpretation of the current statutory scheme that engrafts upon the Law the Tort Claims Act, with its shorter notice filing period, higher standards of liability, heavier burdens of proof, reduced damages, and broad immunity provisions would substantially weaken the relief that could be obtained in a judicial civil rights action for unlawful discrimination under the Law. I do not for a moment believe that it was legislative inadvertence or carelessness that accounts for the possible failure to include invidious discrimination cases under the Tort Claims Act. It is to me inconceivable that the Legislature con-

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templated such inclusion or indeed might even be sympathetic to such an approach in view of its own distinguished history in giving great vigor and maximum protection to these civil rights.

For the foregoing reasons I concur with the result reached by the majority. Justice Clifford joins in this opinion.

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NOT FOR PUBLICATION WITHOUT
THE APPROVAL OF THE COMMITTEE
ON OPINIONS

SUPERIOR COURT OF NEW
JERSEY
APPELLATE DIVISION
A-3827-84T1

ANNE FUCHILLA,

Plaintiff-Appellant,

v.

WILLIAM A. LAYMAN, M.D.,
UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY and
THE BOARD OF TRUSTEES OF THE
UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY,

Defendants-Respondents.

Argued: April 29, 1986
Decided: May 27, 1986

Before Judges Dreier, Bilder and
Gruccio.

On appeal from Superior Court of New
Jersey, Law Division, Essex County.

James M. Burns argued the cause for
appellant (Wilentz, Goldman & Spit-

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zer, attorneys; Mr. Burns of counsel and on the brief).

Douglass L. Derry, Deputy Attorney General argued the cause for respondents (W. Cary Edwards Attorney General of New Jersey, attorney, James J. Ciancia, Assistant Attorney General, of counsel; Mr. Derry, on the brief).

W. Cary Edwards, Attorney General of New Jersey filed a brief amicus curiae for the Division on Civil Rights (Andrea M. Silkowitz, Deputy Attorney General, of counsel; Susan L. Reisner, Deputy Attorney General, on the brief).

The opinion of the court was delivered by

DREIER, J.A.D.

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Plaintiff has appealed from a Law Division summary judgment dismissing her claims against her public employer, The University of Medicine and Dentistry of New Jersey (UMDNJ). She demanded damages for sexual harassment, asserting violations of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., and the federal Civil Rights Act, 42 U.S.C.A. §1983, as well as equitable relief. Plaintiff apparently failed, however, to comply with the 90-day notice provision of the Tort Claims Act, N.J.S.A. 59:8-8.*

* As her notice of claim was not filed until August 1983 and the last discriminatory act was alleged to have occurred more than a year prior thereto, even the extended one-year notice provision of N.J.S.A. 59:8-9 would have been inapplicable, as discussed infra. After the extended period the courts are without

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Plaintiff asserted in the trial court that the Tort Claims Act filing provisions were inapplicable to claims made under both the Law Against Discrimination and 42 U.S.C.A. §1983. The trial judge held to the contrary and dismissed her complaint. We disagree and reverse.

I

The Law Against Discrimination is directed at ending discrimination in employment and public accommodations, N.J.S.A. 10:5-3 and 10:5-4. The Act sets forth a detailed mechanism of procedures and remedies and envisions either utili-

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jurisdiction to permit late notice. Mayers v. Medford Lakes Bd. of Ed., 199 N.J. Super. 511, 516 (App. Div. 1985); Madej v. Doe, 194 N.J. Super. 580, 589 (Law Div. 1984).

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zation of conciliation and administrative law procedures or a Superior Court action each generally exclusive of the other while pending. N.J.S.A. 10:5-13, 10:5-27.*

N.J.S.A. 59:1-2, the legislative preamble to the Tort Claims Act, declares "to be the public policy of this State that public entities shall only be liable for their negligence within the limitations of this act...." (Emphasis added). The Act is broader in scope than this, initial legislative declaration, in that

* The Attorney General on behalf of the Division on Civil Rights has, with leave granted, filed a brief as amicus curiae. The brief solely addresses whether the Tort Claims Act should apply to administrative complaints. The Division correctly argues that any such application would hinder its enforcement

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it includes redress for an "injury," defined in N.J.S.A. 59:1-3 as "death, injury to a person, damage to or loss of property or any other injury that a person may suffer that would be actionable if inflicted by a private person." To determine whether the Legislature intended that a violation of the Law Against Discrimination would constitute an "injury" subject to the Tort Claims Act, we must analyze both the Law Against Discrimination and the Tort Claims Act.

We find that a discrimination claim is dissimilar to those envisioned by the Legislature to be included within the

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powers. In view of our disposition of defendant's claims, however, we need not further discuss these arguments.

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coverage of the Tort Claims Act.* In Lloyd v. Stone Harbor, 179 N.J. Super. 496, 511-12 (Ch. Div. 1981), Judge Haines properly found that a tort claim based upon a violation of the New Jersey Constitution was subject to the notice provision of the Tort Claims Act. Such a finding, however, does not lead to the conclusion that a Law Against Discrimination claim is to be similarly constrained. The Law Against Discrimination's self-contained notice provisions, conciliation periods, mutual exclusivity of the judicial or administrative remedy while such remedy is being pursued, and

* Although the anti-discrimination statute was amended specifically to include public entities only in 1977 (L. 1977, c. 122, N.J.S.A. 10:5-5e), the

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the usual mixed injunctive and compensatory relief sought in a anti-discrimination suit govern those claims to the exclusion of any other time or notice provisions, including those of the Tort Claims Act.

We note also, that the Tort Claims Act provides no immunity for willful or malicious acts caused either by the employee or the entity itself. The Tort Claims Act in N.J.S.A. 59:3-14a and b permits personal liability and full recovery against a public employee for the results of actual malice or willful misconduct. N.J.S.A. 59:2-10 forbids only

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amended Act is construable as declarative of the original provisions in this regard.

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vicarious liability for such conduct on the part of a public entity. Discriminatory conduct actionable under the Law Against Discrimination is more akin to the malicious or willful acts exempted from the Tort Claims Act than the negligently or similarly inflicted injuries covered thereby.

We realize that our decision is in conflict with this court's recent opinion in Healey v. Dover Tp., ___ N.J. Super. ___ (App. Div. 1986). Although it might be possible to distinguish Healey, we would have to strain to do so.* We,

* It might be argued that the sex discrimination in Healey was unintentional and non-malicious, but that the sexual harassment in the case before us was clearly beyond the immunities of the Tort Claims Act. Yet we choose not to

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therefore, must indicate our disagreement with the result there reached.

Our decision is buttressed by Snipes v. Bakersfield, 145 Cal. App. 3d 861, 193 Cal. Rptr. 760 (Ct. App. 1983), interpreting the California Fair Employment and Housing Act. When a similar claim was made that plaintiff had failed to file a timely notice under the California Tort Claims Act, the California Court of Appeals agreed that such actions were exempted from the Tort Claims Act's notice requirements. 193 Cal. Rptr. at 762-765. See also Garcia v. Los Angeles Unified

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rest our decision on such a debatable distinction. Rather, our decision is based upon the general inapplicability of

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School Dist., 119 Cal. Rptr. 544, 549-50 (Ct. App. 1985). We recognize that the administrative remedy in California was exclusive, whereas as noted earlier, a New Jersey plaintiff has the choice between administrative and judicial relief. However, since claims in New Jersey may be discontinued in one forum and then pursued in the other, the exclusivity of the California remedy should not dilute the persuasiveness of the California authorities.

II

The trial judge generally barred "plaintiff's claims." By this we must

(Footnote Continued From Previous Page)

the Tort Claims Act to claims properly initiated pursuant to the Law Against Discrimination.

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assume that he intended to bar not only the Law Against Discrimination claims discussed in part I of this opinion, but also the Federal Civil Rights claims authorized by 42 U.S.C.A. §1983.

Defendants raise a threshold question which, although not argued below, we elect to consider. It could provide a basis for sustaining the trial judge's action, since it would render unnecessary a substantive decision on the Tort Claims Act issue. Defendants contend that neither the University nor its Board of Trustees qualifies as a "person" within the meaning of §1983 which by its terms only forbids denial of a citizen's civil rights by any "person." Thus defendants argue that the University and Trustees are not subject to liability under federal law."

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Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), held the State and its subdivisions free from liability under §1983. Monroe was overruled, however, insofar as local agencies were concerned in Monell v. N.Y. City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), which adopted the rule that local governing bodies and local officials joined in their official capacities could be sued for monetary, declaratory, or injunctive relief. We need not resolve the jurisdictional question of whether Monell signalled a complete abrogation of state immunity from §1983 actions, even in state courts. See Wolcher, "Sovereign Immunity and The Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violation," 61 Cal.

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L. Rev. 189 (1981). That issue is of no moment here, since it is apparent from the statutes controlling the organization of the UMDNJ, N.J.S.A. 18A:64G-1 et seq., that it is an autonomous governmental agency rather than an alter ego of the State.* UMDMJ's predecessor, the College of Medicine and Dentistry, was held to be autonomous and hence not a State agency in DeAngelis v. Addonizio, 103 N.J.

* Were UMDNJ an "alter ego" or agency of State government, we would be faced squarely with the issue of whether §1983 actions are inapplicable to the State itself. Although Monell left open the issue of whether the State itself may be included as a proper party defendant, a negative conclusion was reached by the Seventh Circuit in Toledo, Peoria LW.R. Co. v. State of Illinois, 744 F.2d 1297 (7th Cir. 1984). (See Id. at 1298-99 for a survey of numerous authorities). That court held, however, that a "state official acting under color of state authority may be treated as a 'person' under section 1983." Id. at 1299.

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Super. 238, 253 (Law Div. 1968). After the College's merger with the Rutgers School of Medicine in 1970 the new entity became known as the University of Medicine and Dentistry of New Jersey. The key attributes noted in DeAngelis weighing in favor of independence from direct State control are still present in the merged institution.

We next turn to the issue of whether the Tort Claims Act notice requirements may be applied to bar a §1983 claim. As noted in Brown v. United States, 742 F.2d 1498, 1509 n. 6 (D.C. Cir. 1984), cert. den. sub nom. District of Columbia v. Brown, ____ U.S. ____, 105 S.Ct. 2153, 85 L.Ed.2d 509 (1985), "the overwhelming majority of federal and state courts that have confronted the issue" have precluded

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state tort claims notice provisions from barring federal §1983 rights.

On the other hand, there is no question that a reasonable and generally applicable statute of limitations may be applied to determine whether a §1983 claim is stale. Wilson v. Garcia, 471 U.S. ___, 10 S.Ct. ___, 85 L.Ed.2d 254, 260 (1985). As noted in Brown, however, a notice of claim is an impermissible precondition to suit as opposed to a limitation of action. 742 F.2d at 1508. To borrow such a state restriction would be to add an unwarranted element to a federal right of action. Ibid. Thus in Brown the court held that the plaintiff's noncompliance with the notice-of-claim provision was no bar to his federal remedy. Id. at 1509-10. See also Williams v. Allen, 616 F.Supp. 653, 658 (E.D.N.Y.

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1985); Burroughs v. Holiday Inn, 606 F.Supp. 629, 630 (W.D.N.Y. 1985); Spencer v. Seagoville, 700 S.W.2d 953, 955-56 (Tex. App. 1985); Firestone v. Fritz, 119 Ill. App. 3d 685, 456 N.E.2d 904, 908 (Ill. App. 1983).

A minority view is represented by decisions from Indiana and New York. See Indiana Dept. of Public Welfare v. Clark, 478 N.E.2d 699, 702 (Ind. App. 1985) (terming the notice provision "a procedural precondition to sue" which "overrides the procedural framework of §1983 when the litigant chooses a state court forum"), and Mills v. Monroe Cty., 59 N.Y.2d 307, 451 N.E.2d 456, 464 N.Y.S.2d 709, 711 (Ct. App. 1983), cert. den 464 U.S. 1018, ___ S.Ct. ___, ___ L.Ed.2d ___ (1983). The New York departure from the majority rule, however, has been ex-

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plained as turning on the unusual flexibility of the New York notice-of-claim clause providing for waiver, if necessary for the public interest. Brown, supra, 742 F.2d at 1509 n.6; Williams, supra, 616 F.Supp. at 657-68.

The only New Jersey authority directly on point is Lloyd v. Stone Harbor, supra, 179 N.J. Super. at 512, in which Judge Haines correctly held that a §1983 claim is "unaffected by [plaintiff's] failure to give the notice required by the Tort Claims Act." And see T & M Homes, Inc. v. Mansfield Tp., 162 N.J. Super. 497, 506 (Law Div. 1978) where Judge Haines also noted that federal

... rights cannot be denied by the passage of state legislation. If the contrary were true, every state could deprive its citizens of the very rights which enactments of the Federal

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Congress are designed to protect.

Compare Peters v. Hopewell Tp., 534 F. Supp. 1324, 1338 (D.N.J. 1982), aff'd without opinion 729 F.2d 1448 (3 Cir. 1984).

In Wilson v. Garcia, supra, 471 U.S. at ___, 107 S.Ct. at ___, 85 L.Ed.2d at 266, the Court made clear that in interpreting a §1983 claim a state tort claims act period of limitations is inappropriate and the state's general statute of limitations governing personal injury actions should be applied. The court declared:

...[W]e are satisfied that Congress would not have characterized §1983 as providing a cause of action analogous to state remedies for wrongs committed by public officials. It was the very ineffectiveness of state remedies that led Congress to enact the Civil Rights Act in the first place. Con-

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gress therefore intended that the remedy provided in §1983 be independently enforceable whether or not it duplicates a parallel state remedy. [Id. at 268]

It is apparent to us that Wilson confirms the earlier New Jersey authority in limiting the effect of state statutes upon §1983 claims to the borrowing of the general statute of limitations, and precludes the application of the Tort Claims Act in any respect. Plaintiff's §1983 claim should not have been barred by her failure to file a timely notice-of-claim.

III

Independent of her request for relief under the Law Against Discrimination and 42 U.S.C.A. §1983, plaintiff also sought equitable relief. She sought an injunction against the discrimination

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she alleged she had received as well as damages for lost wages and benefits.

N.J.S.A. 59:1-4 provides:

Nothing in this act shall affect liability based on contract or the right to obtain relief other than damages against the public entity or one of its employees.

This section bars application of the Act to cases where equitable relief is sought. Blazer Corp. v. N.J. Sports & Exposition Auth., 195 N.J. Super. 542, 549 (Law Div. 1984), aff'd 199 N.J. Super. 107 (App. Div. 1985); Lloyd v. Stone Harbor, supra, 179 N.J. Super. at 512.

IV

Given our conclusions concerning the present justiciability of plaintiff's claims for relief under the Law Against Discrimination and 42 U.S.C.A. §1983 and

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for equitable remedies, we need not reach the issue of the timeliness of her claims under the Tort Claims Act itself. We note merely that the last act of the University or Trustees asserted to have been discriminatory was the November 1982 request for plaintiff to leave, allegedly in retaliation for her previous complaints. However, the substance of her discrimination charges appears to be the course of conduct by defendant Layman culminating in plaintiff's transfer in July 1982. Thus her August 1983 notice would have been beyond the one-year extended date of N.J.S.A. 59:8-9.

The judgment dismissing plaintiff's complaint is reversed and the matter is remanded for trial.

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STATUTORY PROVISIONS

I. Pertinent portions of the New Jersey Tort Claims Act

N.J.S.A. 59:1-1. Short title

This subtitle shall be known and may be cited as the "New Jersey Tort Claims Act."

N.J.S.A. 59:1-2. Legislative declaration

The Legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity. On the other hand the Legislature recognizes that while a private entrepreneur may readily be held liable for negligence within the chosen ambit of his activity, the area within which government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done. consequently, it is hereby declared to be the public policy of this State that public entities shall only be liable for their negligence within the limitations of this act and in accordance with the fair and uniform principles established herein. All of the provisions of this act should be

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construed with a view to carry out the above legislative declaration.

N.J.S.A. 59:1-3. Definitions

As used in this subtitle:

"Employee" includes an officer, employee, or servant, whether or not compensated or part-time, who is authorized to perform any act or service; provided, however, that the term does not include an independent contractor.

"Employment" includes office; position; employment; or service, under the supervision of the Palisades Interstate Park Commission, in a volunteer program in that part of the Palisades Interstate Park located in New Jersey.

"Employment" includes office, position or employment.

"Enactment" includes a constitutional provision, statute, executive order, ordinance, resolution or regulation.

"Injury" means death, injury to a person, damage to or loss of property or any other injury that a person may suffer that would be actionable if inflicted by a private person.

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"Law" includes enactments and also the decisional law applicable within this State as determined and declared from time to time by the courts of this State and of the United States.

"Public employee" means an employee of a public entity, and includes a person participating, under the supervision of the Palisades Interstate Park Commission, in a volunteer program in that part of the Palisades Interstate Park located in New Jersey.

"Public entity" includes the State, and any county, municipality, district, public authority, public agency, and any other political subdivision or public body in the State.

"State" shall mean the State and any office, department, division, bureau, board, commission or agency of the State, but shall not include any such entity which is statutorily authorized to sue and be sued. "State" also means the Palisades Interstate Park Commission, but only with respect to employees, property and activities within the State of New Jersey.

"Statute" means an act adopted by the Legislature of this State or by the Congress of the United States.

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N.J.S.A. 59:1-4. Effect upon liability based on contract or right to relief other than damages

Nothing in this act shall affect liability based on contract or the right to obtain relief other than damages against the public entity or one of its employees.

N.J.S.A. 59:2-1. Immunity of public entity generally

a. Except as otherwise provided by this act, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.

b. Any liability of a public entity established by this act is subject to any immunity of the public entity and is subject to any defenses that would be available to the public entity if it were a private person.

N.J.S.A. 59:2-2. Liability of public entity

a. A public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances.

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b. A public entity is not liable for an injury resulting from an act or omission of a public employee where the public employee is not liable.

N.J.S.A. 59:8-8. Time for presentation of claims

A claim relating to a cause of action for death or for injury to person or to property shall be presented as provided in this chapter not later than the ninetieth day after accrual of the cause of action. After the expiration of 6 months from the date notice of claim is received, the claimant may file suit in an appropriate court of law. The claimant shall be forever barred from recovering against a public entity if:

a. He failed to file his claim with the public entity within 90 days of accrual of his claim except as otherwise provided in section 59:8-9; or

b. Two years have elapsed since the accrual of the claim; or

c. The claimant or his authorized representative entered into a settlement agreement with respect to the claim.

Nothing in this section shall prohibit an infant or incompetent

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person from commencing an action under this act within the time limitations contained herein, after his coming to or being of full age or sane mind.

N.J.S.A. 59:8-9. Notice of late claim

A claimant who fails to file notice of his claim within 90 days as provided in section 59:8-8 of this act, may, in the discretion of a judge of the superior court, be permitted to file such notice at any time within 1 year after the accrual of his claim provided that the public entity has not been substantially prejudiced thereby. Application to the court for permission to file a late notice of claim shall be made upon motion based upon affidavits showing sufficient reasons for his failure to file notice of claim within the period of time prescribed by section 59:8-8 of this act; provided that in no event may any suit against a public entity arising under this act be filed later than 2 years from the time of the accrual of the claim.

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II. Medical and Dental Education Act of 1970, N.J.S.A. 18A:64G-1 et seq.

N.J.S.A. 18A-64G-1. Short title

This act shall be known and may be cited as the "Medical and Dental Education Act of 1970."

N.J.S.A. 18A:64G-2. Findings and declaration

The Legislature and Governor of the State of New Jersey hereby find that the establishment and operation of a program of medical and dental education is in the best interest of the State to provide greater numbers of trained medical personnel to assist in the staffing of the hospitals and public institutions and agencies of the State and to prepare greater numbers of students for the general practice of medicine and Dentistry, and find, declare and affirm, as a matter of public policy of the State, that it is the responsibility of the State to provide funds necessary to establish and operate such programs of education, in the most economical and efficient manner, and that, in furtherance of such policy, the school of medicine heretofore established by Rutgers, The State University, (hereinafter called the "Rutgers Medical School") and the New Jersey College of Medicine and Dentistry shall be combined into a single entity to be

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known as the University of Medicine and Dentistry of New Jersey.

N.J.S.A. 18A:64G-3. Establishment of University of Medicine and Dentistry

There is hereby established in the Department of Higher Education a body corporate and politic to be known as the "University of Medicine and Dentistry of New Jersey." The exercise by the university of the powers conferred by this act in the presentation and operation of a program of medical and dental education shall be deemed to be public and essential governmental functions necessary for the welfare of the State and the people of New Jersey.

N.J.S.A. 18A:64G-3.1 Self-government and conduct free of partisanship

It is declared to be the public policy of the State that the university shall be given a high degree of self-government and that the government and conduct of the university shall be free of partisanship.

N.J.S.A. 18A:64G-3.2. Use of title university to not imply future change in institutional mission

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It is declared to be the public policy of the State that the use of the title university by the College of Medicine and Dentistry of New Jersey does not imply a future change in its institutional mission to permit the granting of undergraduate degrees or the expansion of its graduate degree programs beyond the biomedical science fields now authorized.

N.J.S.A. 18A:64G-3.3. Transfer of appropriations, grants, gifts, other moneys and property, employees, personal property of college to university; continuance of orders, rules or regulations

Upon the establishment of the body corporate and politic known as the University of Medicine and Dentistry of New Jersey:

a. All appropriations available and to become available to the College of Medicine and Dentistry of New Jersey shall be transferred to the university by the Director of the Division of Budget and Accounting in the Department of the Treasury and shall be available for the objects and purposes for which appropriated, subject to any terms, restrictions, limitations or other requirements imposed by the State budget;

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b. All other grants, gifts, other moneys and property available and to become available to or for the College of Medicine and Dentistry of New Jersey shall be transferred to the university and shall be available for the objects and purposes of the university, subject to any terms, restrictions, limitations or other requirements imposed by State and Federal law or otherwise;

c. All employees of the College of Medicine and Dentistry of New Jersey shall become employees of the university. Nothing in this act shall be considered to deprive any person of any tenure rights or of any right or protection provided him under any pension law or retirement system or any other law of this State;

d. All files, papers, records, equipment and other personal property of the College of Medicine and Dentistry of New Jersey shall be transferred to the university; and

e. All orders, rules or regulations theretofore made or promulgated by the College of Medicine and Dentistry of New Jersey shall continue with full force and effect as the orders, rules and regulations of the university until amended or repealed by the university.

N.J.S.A. 18A:64G-3.4 Substitution

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of university for college in
actions or proceedings by or
against college

This act shall not affect actions or proceedings, civil or criminal, brought by or against the College of Medicine and Dentistry of New Jersey, but such actions or proceedings may be prosecuted or defended in the same manner and to the same effect by the University of Medicine and Dentistry of New Jersey as if the foregoing provisions had not taken effect; nor shall any of the foregoing provisions affect any order or regulation made by, or other matters or proceedings before, the College of Medicine and Dentistry of New Jersey, and all such matters or proceedings pending before the College of Medicine and Dentistry of New Jersey on the effective date of this act shall be continued by the university, as if the foregoing provisions had not taken effect.

N.J.S.A. 18A:64G-3.5. Reference to
college of medicine and dentistry
to mean and refer to university

Whenever in any law, rule, regulation, contract, document, judicial or administrative proceeding or otherwise, reference is made to the College of Medicine and Dentistry of New Jersey, the same shall mean and

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refer to the University of Medicine and Dentistry of New Jersey.

N.J.S.A. 18A:64G-3.6. Examination and enforcement of laws and regulations by state board of higher education

The general powers of supervision and control of the State Board of Higher Education over the University of Medicine and Dentistry of New Jersey include the power to visit the university to examine into its manner of conducting its affairs and to enforce and observance of its laws and regulations and the laws of the State.

N.J.S.A. 18A:64G-3.7 Continuance of powers of supervision and control by board of higher education

Nothing in this act shall be construed to abrogate or derogate from the powers of the Board of Higher Education of supervision and control of the university in accordance with existing law.

N.J.S.A. 18A:64G-4. Board of trustees

a. The government, control, conduct, management and administration of the university shall be vested in the board of trustees of the university. The membership of the board of trustees shall consist

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of the Chancellor of the Department of Higher Education and the Commissioner of Health, who shall serve ex officio, without vote, and 11 voting members, each of whom shall be appointed by the Governor, with the advice and consent of the Senate, for a term of 3 years and shall serve until his successor is appointed and has qualified. Any vacancies in the voting membership of the board occurring other than by expiration of term shall be filled in the same manner as the original appointment but for the unexpired term only. Each voting member of the board of trustees before entering upon his duties shall take and subscribe an oath to perform the duties of his office faithfully, impartially and justly to the best of his ability. A record of such oath shall be filed in the office of the Secretary of State. Each voting member of the board may be removed from office of the Governor, for cause, after a public hearing.

b. The members of the board of trustees shall meet at the call of the Governor for purposes of organizing. The board shall thereafter meet at such times and places as it shall designate.

c. The Governor shall designate one of the voting members as chairman of the board. The board shall select such other officers from

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among its members as shall be deemed necessary.

d. The board shall have the power to appoint and regulate the duties, functions, powers and procedures of committees, standing or special, from its members and such advisory committees or bodies, as it may deem necessary or conducive to the efficient management and operation of the university, consistent with this act and other applicable statutes.

N.J.S.A. 18A:64G-4.1 Continuation of board of trustees

The board of trustees of the College of Medicine and Dentistry of New Jersey is continued as the board of trustees of the university and shall have and exercise the powers, authority, rights and privileges and shall be subject to the duties, obligations, and responsibilities set forth in this act.

N.J.S.A. 18A:64G-5. Reimbursement of board members for expenses

Members of the board of trustees shall not receive compensation for their services as such. Each member shall be reimbursed for his actual expenses reasonably incurred in the performance of his duties as a member.

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N.J.S.A. 18A:64G-6. Powers and duties of board

The board of trustees of the university, within the general policies and guidelines set by the Board of Higher Education, shall have the general supervision over and be vested with the conduct of the university, including its health care facilities regardless of the source of funding. It shall have the power and duty to:

- (a) Adopt and use a corporate seal;
- (b) Determine the educational curriculum and program of the university;
- (c) Determine policies for the organization, administration, and development of the university;
- (d) Study the educational and financial needs of the university, annually acquaint the Governor and Legislature with the condition of the university, and prepare and submit an annual request for appropriation to the State Board of Higher Education in accordance with law;
- (e) Disburse all moneys appropriated to the university by the Legislature and all moneys received from tuition, fees, auxiliary services and other sources;

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(f) Direct and control expenditures and transfers of funds appropriated to the university in accordance with the provisions of the State budget and appropriation acts of the Legislature, and, as to funds received from other sources, direct and control expenditures and transfers in accordance with the terms of any applicable trusts, gifts, bequests, or other special provisions, reporting changes and additions thereto and transfers thereof to the Director of the Division of Budget and Accounting in the Department of the Treasury and to the Chancellor of Higher Education. All accounts of the university shall be subject to audit by the State at any time;

(g) In accordance with the provisions of the State budget and appropriation acts of the Legislature, appoint and fix the compensation and term of office of a president of the university who shall be the executive officer of the university;

(h) In accordance with the provisions of the State budget and appropriation acts of the Legislature, appoint, upon nomination of the president, such deans and other members of the academic, administrative and teaching staffs as shall be required and fix their compensation and terms of employment;

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(i) In accordance with the provisions of the State budget and appropriation acts of the Legislature, appoint, remove, promote and transfer such other officers, agents, or employees as may be required to carry out the provisions of this act and assign their duties, determine their salaries, and prescribe qualifications for all positions and in accordance with the salary schedules of the Civil Service Commission wherever possible;

(j) Fix and determine, after consultation with the Board of Higher Education, tuition rates, and other fees to be paid by students;

(k) Grant diplomas, certificates or degrees;

(l) Enter into contracts and agreements with the State or any of its political subdivisions or with the United States or with any public body, department or other agency of the State or the United States or with any individual, firm or corporation which are deemed necessary or advisable by the board for carrying out the provisions of this act. A contract or agreement pursuant to this subsection may require a municipality to undertake obligations and duties to be performed subsequent to the expiration of the term of office of the elected governing body of such municipality

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which initially entered into or approved said contract or agreement, and the obligations and duties so incurred by such municipality shall be binding and of full force and effect, notwithstanding that the term of office of the elected governing body of such municipality which initially entered into or approved said contract or agreement, shall have expired;

(m) Accept from any government or governmental department, agency or other public or private body or from any other source grants or contributions of money or property which the board may use for or in aid of any of its purposes;

(n)(1) Acquire (by gift, purchase, condemnation or otherwise), own, lease, dispose of, use and operate property, whether real, personal or mixed, or any interest therein, which is necessary or desirable for university purposes;

(2) Adopt standing operating rules and procedures for the purchase of all equipment, materials, supplies and services; however, no contract on behalf of the university shall be entered into for the purchase of services, materials, equipment and supplies, for doing of any work, or for the hiring of equipment or vehicles, where the sum to be expended exceeds \$12,500.00 or the amount de-

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terminated by the Governor as provided herein, unless the university shall first publicly advertise for bids and shall award the contract to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the university, price and other factors considered. Such advertising shall not be required in those exceptions created by the board of trustees of the university, which shall be in substance those exceptions contained in sections 4 and 5 of P.L.1954, c. 48 (C. 52:34-9 and 10) or for the supplying of any product or the rendering of any service by a public utility subject to the jurisdiction of the Board of Public Utilities of this State and tariffs and schedules of the charges, made, charged, or exacted by the public utility for any such products to be supplied or services to be rendered are filed with the said board. Commencing January 1, 1985 and every two years thereafter, the Governor, in consultation with the Department of the Treasury, shall adjust the threshold amount set forth in this paragraph in direct proportion to the rise or fall of the consumer price index for all urban consumers in the New York City and the Philadelphia areas as reported by the United States Department of Labor. The Governor shall notify the university of the adjustment. The adjustment shall

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become effective on July 1 of the year in which it is reported.

This subsection shall not prevent the university from having any work done by its own employees, nor shall it apply to repairs, or to the furnishing of materials, supplies or labor, or the hiring of equipment or vehicles, when the safety or protection of its or other public property or the public convenience requires or the exigency of the university's service will not admit of such advertisement. In such case, the university shall, by resolution passed by the affirmative vote of its board of trustees, declare the exigency or emergency to exist, and set forth in the resolution the nature and approximate amount to be expended; shall maintain appropriate records as to the reason for such awards; and shall report regularly to its board of trustees on all such purchases, the amounts and the reasons therefor.

(3) Employ architects to plan buildings; secure bids for the construction of buildings and for the equipment thereof; make contracts for the construction of buildings and for equipment; and supervise the construction of buildings. All capital expenditures in excess of \$500,000.00 shall be subject to the approval of the Board of Higher Education; and

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(4) Manage and maintain, and provide for the payment of all charges on and expenses in respect of, all properties utilized by the university;

(o) Borrow money for the needs of the university, as deemed requisite by the board, in such amounts and for such time and upon such terms as may be determined by the board, provided that no such borrowing shall be deemed or construed to create or constitute a debt, liability, or a loan or pledge of the credit or be payable out of property or funds, other than moneys appropriated for that purpose, of the State;

(p) Exercise the right of eminent domain, pursuant to the provisions of the "Eminent Domain Act of 1971," P.L.1971, c. 361 (C. 20:3-1 et seq.), to acquire any property or interest therein;

(q) Adopt bylaws and make and promulgate such rules, regulations and orders, not consistent with the provisions of this act as are necessary and proper for the administration and operation of the university and to implement the provisions of this act;

(r) Authorize any new program, educational department or school which will require, at the time of establishment or thereafter, an addi-

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tional expenditure of money, if the establishment thereof is approved by the Board of Higher Education and provision is made therefor by law; and

(s) Function as a public employer under the "New Jersey Employer-Employee Relations Act," P.L.1941, c. 100 (C. 34:13A-1 et seq.) and conduct all labor negotiations, and with the participation of the Chancellor's Office and the Governor's Office of Employee Relations act as the chief spokesperson with respect to all matters under negotiation.

N.J.S.A. 18A:64G-7. Additional powers and duties of board

The board of trustees, in addition to the other powers and duties provided herein, shall have and exercise the powers, rights and privileges that are incident to the proper government, conduct and management of the university and the control of its properties and funds and such powers granted to the university or the board or reasonably implied, may be exercised without recourse or reference to any department or agency of the State, except as otherwise provided by this act. In addition, the board may retain independent counsel with the approval of the Attorney General.

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N.J.S.A. 18A:64G-8. Investment of funds

All functions, powers and duties relating to the investment or reinvestment of funds within the jurisdiction of the board of trustees including the purchase, sale or exchange of any investments or securities shall be exercised and performed by the Director of the Division of Investment in accordance with the provisions of chapter 270, of the laws of 1950 (C 52:18A-79 et seq.). Before any such investment, reinvestment, purchase, sale or exchange shall be made by said director for or on behalf of the board of trustees, the Director of the Division of Investment shall submit the details thereof to said board, which shall, itself or by its finance committee, within 48 hours, exclusive of Sundays and public holidays, after such submission to it, file with the director its written acceptance or rejection of such proposed investment, reinvestment, purchase, sale or exchange; and the director shall have authority to make such investment, reinvestment, purchase, sale or exchange for or on behalf of said board, unless there shall have been filed with him a written rejection thereof by the board or its finance committee as herein provided. The board of trustees shall determine from time to time the cash require-

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ments of the various funds and accounts established by it and the amount available for investment, all of which shall be certified to the State Treasurer and the Director of the Division of Investment.

The finance committee of the board of trustees shall consist of three members of said board who shall be appointed in the same manner and for the same term as other committees of said board are appointed.

N.J.S.A. 18A:64G-9. Authorized investments

The Director of the Division of Investment, in addition to other investments, presently or from time to time hereafter authorized by law, shall have authority, subject to any acceptance required, to invest and reinvest such funds in, and to acquire for or on behalf of the board such bonds or other evidence of indebtedness or capital stock or other securities issued by any company incorporated within the United States or within the Dominion of Canada, which shall be authorized or approved for investment by regulation of the State Investment Council and in which life insurance companies organized under the laws of this State may legally invest.

N.J.S.A. 18A:64G-10. Depositories and custodians

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The State Treasurer shall be the custodian of said board's investment funds, shall select all depositories and custodians and shall negotiate and execute custody agreements in connection with the assets or investments of any said funds.

N.J.S.A. 18A:64G-11. President of university: powers and duties

The president of the university shall be responsible to the board of trustees and shall have such powers as shall be requisite, for the executive management and conduct of the university in all departments, branches and divisions, and for the execution and enforcement of the bylaws, rules, regulations and orders governing the management, conduct and administration of the university.

N.J.S.A. 18A:64-12. Employee retirement rights

Subject to the provisions of P.L. 1969, c. 242 and except as otherwise provided by law, the university shall be deemed to be an employer for the purposes of P.L. 1954, c. 84, the "Public Employees' Act" (C. 43:15A-1 et seq.) and shall also be deemed to be a "public agency or organization" within the meaning of section 71 of said act (C. 43:15A-71). Prior service credit shall not be extended to any

APPENDIX D

officer or employee of the university who enrolls in the public employees' retirement system if he is entitled to a pension or an annuity based on such prior service under any other pension act or program.

N.J.S.A. 18A64G-14. Personal liability of trustees and officers

No trustee or officer of the university shall be personally liable for any debt, obligation or other liability of the university or incurred by or on behalf of the university or any constituent unit thereof.

N.J.S.A. 18A:64G-15. Debts and liabilities; pledge of credit

No provision in this act contained shall be deemed or construed to create or constitute a debt, liability, or a loan or pledge of the credit, of the State of New Jersey.

N.J.S.A. 18A-64G-29. Rights of state in former medical school; transfer

In order to carry out the purposes of this act and to provide the program of medical and dental education required for the benefit of the State and the people of New Jersey, all rights of the State of

APPENDIX D

New Jersey in the Rutgers Medical School are hereby transferred to the College of Medicine and Dentistry of New Jersey. The college is hereby authorized to acquire the facilities of Rutgers Medical School and devote the same to the purposes of public higher education in the State in accordance with section 2 of this act and with the terms of any gift, grant, trust, contract or other agreement with the State or any of its political subdivisions or with the United States or with any public body, department or any agency of the State or the United States or with any individual, firm or corporation.

N.J.S.A. 18A:64G-30. Acquisition of interest in Rutgers Medical School facilities; transfers to University of Medicine and Dentistry

Upon acquisition by the college of such interest in the facilities of Rutgers Medical School as will permit the college to carry out the purposes set forth in section 2 of this act:

(a) All appropriations available and to become available to the Rutgers Medical School and Rutgers, The State University for the purposes of the Rutgers Medical School shall be transferred to the College of Medicine and Dentistry of New Jersey by the Director of the

APPENDIX D

Division of Budget and Accounting in the Department of the Treasury and shall be available for the objects and purposes for which appropriated, subject to any terms, restrictions, limitations or other requirements imposed by the State budget;

(b) All other grants, gifts, other moneys and property available and to become available to or for the Rutgers Medical School shall be transferred to the College of Medicine and Dentistry of New Jersey and shall be available for the objects and purposes of the college, subject to any terms, restrictions, limitations or other requirements imposed by State and Federal law or otherwise;

(c) All employees of Rutgers Medical School shall become employees of the College of Medicine and Dentistry of New Jersey. Nothing in this act shall be considered to deprive any person of any tenure rights or of any right or protection provided him under any pension law or retirement system or any other law of this State;

(d) All files, books, papers, records, equipment and other personal property of Rutgers Medical School shall be transferred to the College of Medicine and Dentistry of New Jersey; and

APPENDIX D

(e) All orders, rules or regulations theretofore made or promulgated by Rutgers Medical School shall continue with full force and effect as the orders, rules and regulations of the College of Medicine and Dentistry of New Jersey until amended or repealed by the college.

APPENDIX E

REINHARDT & SCHACHTER, P.D.
744 Broad Street, Suite 3101
Newark, New Jersey 07102
(201) 623-1600

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO. L-988-82

ANNE FUCHILLA,	:	
	:	Civil Action
Plaintiff,	:	
	:	ORDER GRANTING
v.	:	JUDGMENT OF
	:	DISMISSAL OF
DR. WILLIAM A. LAYMAN	:	COMPLAINT AND
and UNIVERSITY OF	:	DENYING LEAVE
MEDICINE AND DENTISTRY	:	TO AMEND
OF NEW JERSEY and	:	COMPLAINT
THE BOARD OF TRUSTEES	:	
OF THE UNIVERSITY OF	:	
MEDICINE AND DENTISTRY	:	
OF NEW JERSEY,	:	
	:	
Defendants.	:	
	:	

This matter having been opened to
the Court on the motion of defendant
University of Medicine and Dentistry of
New Jersey and Board of Trustees of the
University of Medicine and Dentistry of

APPENDIX E

New Jersey to dismiss the complaint for failure of the plaintiff to comply with the notice provisions of the Tort Claims Act, and on motion of the plaintiff to amend the complaint, Irwin I. Kimmelman, Attorney General of New Jersey, appearing by Douglass L. Derry, Deputy Attorney General, and Reinhardt & Schachter, P.C., attorneys for plaintiff, appearing by Denise Reinhardt, Esquire, and the Court having reviewed the briefs and affidavits submitted by the parties and having considered arguments of counsel, and for the reasons set forth in the ruling of this court in its opinion rendered from the bench in this matter of March 1, 1985, which are incorporated herein by reference, and for good cause shown; it is this 20th day of March, 1985;

APPENDIX E

ORDERED that the First Amended Complaint in this matter shall be and hereby is dismissed; and it is further

ORDERED that for the reasons set forth in the same court's opinion, plaintiff's motion for leave to amend the complaint be, and the same hereby is, denied.

F. Michael Caruso, J.S.C.

(2)

No. 87-2055

Supreme Court, U.S.

FILED

JUL 16 1988

JOSEPH F. SPANIOLO, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY and
THE BOARD OF TRUSTEES OF THE
UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY,

Petitioners,

v.

ANNE FUCHILLA,

Respondent.

On Petition for Certiorari to the
Supreme Court of New Jersey

**BRIEF IN OPPOSITION OF
RESPONDENT ANNE FUCHILLA**

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No. 87-2055

In The
Supreme Court of the United States
October Term, 1987

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY and
THE BOARD OF TRUSTEES OF THE
UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY,

Petitioners,

v.

ANNE FUCHILLA,

Respondent.

On Petition for Certiorari to the
Supreme Court of New Jersey

**BRIEF IN OPPOSITION OF
RESPONDENT ANNE FUCHILLA**

Respondent, Anne Fuchilla, herewith submits her brief in opposition to the Petition for a Writ of Certiorari filed herein by the University of Medicine and Dentistry of New Jersey and The Board of Trustees of the University of Medicine and Dentistry of New Jersey. The petition seeks review of *Fuchilla v. Layman*, 109 N.J. 319, 537 A.2d 652 (1988), a decision of the Supreme Court of New Jersey, decided February 8, 1988.

COUNTERSTATEMENT OF THE CASE

Petitioners seek review of the decision of the New Jersey Supreme Court in *Fuchilla v. Layman*, 109 N.J. 319, 537 A.2d 652 (1988) (Pet. Ap. 1a-81a),¹ in which the Court held: (1) that the notice provisions of the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.*, specifically, N.J.S.A. 59:8-8, 9, do not apply to Section 1983 actions brought in state courts, on the ground that the Supremacy Clause, U.S. Const., Article VI, precludes the application of state procedural requirements which thwart the purposes of federal legislation; and (2) that the University is a "person" within the meaning of 42 U.S.C. § 1983 and therefore, may be liable for civil rights violations under that statute.²

The New Jersey Supreme Court thereby affirmed the decision of the Appellate Division of the Superior Court of New Jersey, 210 N.J. Super. 574, 510 A.2d 281 (App. Div. 1986) (Pet. Ap. 82a-103a), and rectified the trial court's error in dismissing Respondent's complaint for failure to comply with the notice provisions of the Tort Claims Act in connection with her suit, *inter alia*, for violations of Section 1983.

That the New Jersey Supreme Court's decision on the notice issue was correct, and in accordance with federal

¹ References to Respondent's appendix appended to this brief are referred to as "Res. Ap.". References to the appendix attached to the Petition are referred to as "Pet. Ap."

² The New Jersey Supreme Court also held that the notice provisions of the New Jersey Tort Claims Act do not apply to claims brought under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.* Petitioners do not seek review of that portion of the Court's decision.

law, is clear, particularly since this Court recently reversed another state Supreme Court, the Wisconsin Supreme Court, which had held that a notice requirement is a permissible condition to institution of a Section 1983 action in state court. In *Felder v. Casey*, — U.S. —, 56 U.S.L.W. 4689 (1988), *rev'g* 139 Wis.2d 614, 408 N.W.2d 19 (1987), this Court held that such a notice provision violates the Supremacy Clause and improperly limits a plaintiff's federal rights under Section 1983. This Court's *Felder* decision (decided subsequent to the filing of the within petition, in which petitioner relied on the reversed decision of the Wisconsin Supreme Court), not only removes any federal question as to the notice issue, but, it is respectfully submitted, essentially renders moot this basis for the petition.

The holding of the New Jersey Supreme Court that Petitioner the University of Medicine and Dentistry of New Jersey ("UMDNJ") is a "person" under Section 1983, similarly, is equally supported by federal law and equally contrary to Petitioners' vain attempts to have this issue decided in the manner they deem appropriate. In presenting this issue for the first time in a footnote to their brief in the Appellate Division, Petitioners sought to convince that court of the propriety of their position on this issue in a case in which it had not been factually developed or indeed, raised at all. After an adverse decision by the Appellate Division on this question, *Fuchilla*, *supra*, 210 N.J. Super. at 581-84, 510 A.2d at 284-85 (Pet. Ap. 93a-96a), Petitioners sought, and were granted, certification to the New Jersey Supreme Court on this newly-raised issue. That Court specifically was urged by Petitioners "not to remand the matter but to resolve that

issue," *Fuchilla, supra*, 109 N.J. at 325, 537 A.2d at 655 (Pet. Ap. 14a), and the record was supplemented by Petitioners at that juncture for the very purpose of ensuring that the Court would decide it, based upon the particular factual circumstances applicable to Petitioners. *Id.* Once again, however, Petitioners were disappointed in the result.

Petitioners now seek this Court's review of the New Jersey Supreme Court's well-reasoned determination, made in accordance with federal standards applicable to the facts surrounding UMDNJ's relationship with the State of New Jersey, that UMDNJ is a "person" under Section 1983. *Fuchilla, supra*, 109 N.J. at 323-30, 537 A.2d at 654-57 (Pet. Ap. 8a-29a). Petitioners criticize what they claim is a "cursory and flawed analysis" by the New Jersey Supreme Court of the factors applicable to such a determination—an analysis utilizing the facts supplied by Petitioners—and request that this Court establish "uniform federal criteria" for determining whether a public university is immune from suit under Section 1983. Petitioners barely conceal their true request—that this Court determine that *all* such universities are *immune* from suit. Petitioners ignore well-established case law which mandates that such a determination be made on a case-by-case basis, through an application of the criteria for such determinations to the facts and circumstances of each university's relationship with its state of residence.

As argued herein, Petitioners' contention that this Court should intervene in this case to establish "uniform federal criteria" for such determinations is not only unwarranted, but would be contrary to existing, consistent federal law on this issue.

ARGUMENT

I. CERTIORARI SHOULD NOT BE GRANTED BECAUSE OF THE ASSERTED NEED FOR "UNIFORM FEDERAL CRITERIA" AS TO WHETHER PUBLIC UNIVERSITIES ARE "PERSONS" UNDER 42 U.S.C. § 1983. NO FEDERAL QUESTION EXISTS REQUIRING REVIEW BY THIS COURT, AS SUCH FEDERAL CRITERIA ALREADY EXIST AND WERE PROPERLY APPLIED BY THE NEW JERSEY SUPREME COURT.

For liability to attach under 42 U.S.C. § 1983, the defendant must be a "person" within the meaning of that section. This Court has, at minimum, implied that a state cannot be a "person" for § 1983 purposes, *see Quern v. Jordan*, 440 U.S. 332, 350 (1979) (Brennan, J., concurring), but has held that municipalities may be considered "persons." *Monell v. Department of Social Services*, 436 U.S. 658 (1978). This reasoning is related to the analysis performed to determine immunity from federal suit under the Eleventh Amendment, a matter of federal law. *Blake v. Kline*, 612 F.2d 718, 722 (3d Cir. 1979), *cert. denied*, 447 U.S. 921 (1980).

In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), this Court discussed the types of factors useful in determining whether an agency is the alter-ego or "arm of the state," and therefore immune from suit. These factors are: (1) how the agency is characterized by the language of the creating statutes; (2) whether the agency derives its funding from local or state government; (3) whether the state is financially responsible for liabilities and obligations incurred by the agency; (4) whether the members or officers of the agency are appointed by the state, or county or local, governments;

(5) whether the function performed by the agency is more traditionally associated with state, or with county or local, government; and (6) whether the agency's actions are subject to veto by the state government. *Id.* at 401-02.

None of these factors is in itself conclusive; however, the Court in *Lake Country*, as well as in numerous other decisions, has indicated that the primary reason for permitting state agencies to invoke Eleventh Amendment immunity is "to protect the state treasury from liability that would have . . . essentially the same practical consequences as a judgment against the State itself." *Lake Country*, *supra*, 440 U.S. at 401, citing *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945). See also *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101 (1984).

The Court of Appeals for the Third Circuit has developed criteria co-extensive with the analysis performed in *Lake Country*. In *Urbano v. Board of Managers*, 415 F.2d 247 (3d Cir. 1969), *cert. denied*, 397 U.S. 948 (1970), the Third Circuit explained this nine-factor analysis, which, like this Court's decisions, contains no single conclusive factor, but gives substantial weight to the financial relationship between the agency and the state. See *id.* at 251. See also *Blake v. Kline*, *supra*, 612 F.2d at 723.

The nine *Urbano* criteria are: (1) local law and decisions concerning the relationship between the agency and the state; (2) whether a judgment would have to be paid from the state treasury; (3) whether the agency has the funds or power to satisfy such a judgment; (4) whether the agency is performing a "governmental or proprietary" function; (5) whether the agency has been separately incorporated; (6) the degree of autonomy the agency main-

tains over its operations; (7) whether the agency has the power to make contracts and to sue and be sued; (8) whether the agency's property is immune from taxation; and (9) whether the state has immunized itself from responsibility for the agency's operations. *Urbano*, *supra*, 415 F.2d at 250-51. The second and third factors—the source of payment of a judgment against the agency—are recognized as “perhaps the most important” of these, but no one factor “is conclusive”. *Id.*

A thorough analysis of the *Urbano* test, as further explained in *Blake* (both ignored by the within petition), reveals that the Third Circuit approach is merely a more detailed characterization of the factors employed by this Court in *Lake Country* and similar decisions. See, e.g., *Port Authority Police Benevolent Ass'n, Inc. v. Port Authority of New York and New Jersey*, 819 F.2d 413, 414-17 (3d Cir.), *cert. denied*, 108 S.Ct. 344 (1987) (discussing *Urbano* as complementary to *Lake Country*).³

Petitioners, argue, however, that uniform federal criteria do not exist for determining whether an entity is a “person” under § 1983 or whether it is immune from suit as the alter ego of the state. Moreover, Petitioners assert that the New Jersey Supreme Court's decision in the case at bar “paid scant, if any, attention to the issue of whether the State of New Jersey is the real party in interest in this case.” (Pet. at 22, *citing Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 101 (1984)). This statement, quite simply, is inaccurate. Petitioners ignore

³ Indeed, the *Urbano* factors have been applied in several circuits other than the Third Circuit. See *Ainsworth Aristocrat Int'l Pty. v. Tourism Co. of Puerto Rico*, 818 F.2d 1034, 1037 (1st Cir. 1987); *Hall v. Medical Coll. of Ohio at Toledo*, 742 F.2d 299 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113 (1985).

the fact that the well-reasoned decision of the New Jersey Supreme Court not only took into consideration all facts Petitioners placed before it, but had the benefit of a prior, detailed factual analysis of the New Jersey District Court resolving this very issue as to UMDNJ in the same manner. *See Cohen v. Board of Trustees of the University of Medicine and Dentistry of New Jersey, et al.*, Civ. Action No. 85-3841 (unpublished opinion) (D. N.J. 1986) (*See* excerpts, Res. Ap.).⁴

Moreover, Petitioners' repeated references to *Pennhurst*, and particularly to the phrase "whether the State is the real party in interest," cloud rather than clarify the issue. *Pennhurst* addressed the question whether state officials could be sued in that capacity. It did not discuss, let alone establish, a standard for whether and when an agency might be an alter ego of the state. *Pennhurst*, *supra*, 465 U.S. at 101. Petitioners' reliance on *Pennhurst* with respect to the issue of an agency's immunity, therefore, is misplaced. Since that case merely considered the issue of immunity for state officials, not for state or local agencies, it would have been pointless for the *Pennhurst* Court to engage in a discussion of the relationship between states and state agencies. It is thus misleading to rely on *Pennhurst's* much simpler analysis in evaluating the more complex agency situation. This reliance is all the more disingenuous in light of the fact that Petitioners have

⁴ Moreover, the Third Circuit has implicitly found that UMDNJ is a "person" under Section 1983 by its discussion of the merits of a case against UMDNJ after trial (and after the District Court had found no sovereign immunity), where, as a jurisdictional defense, the issue would have been explored by the Circuit Court prior to any discussion on the merits. *See Mauriello v. University of Medicine and Dentistry*, 781 F.2d 46 (3d Cir.), cert. denied, 107 S.Ct. 80 (1986).

ignored the more detailed *Urbano* and *Blake* analysis appropriate to the state/state agency relationship—an analysis which the New Jersey Supreme Court diligently followed.

Thus, Petitioners' characterization of the emphasis in the New Jersey Supreme Court's decision on the financial relationship between the University and the State as a "fundamental flaw" (Pet. at 23) ignores both the existence, and the New Jersey Supreme Court's application, of these more appropriate federal guidelines. Petitioners' characterization also fails to consider this Court's standard for identifying the "real party in interest": "[w]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest. . . ." *Ford Motor Co.*, *supra*, 323 U.S. at 464 [citations omitted]. The New Jersey Supreme Court's emphasis on the financial relationship between UMDNJ and the State of New Jersey is thus not a "fundamental flaw," but rather the fundamental underpinning of the "real party in interest" analysis. The New Jersey Supreme Court correctly determined, from the appropriations handbook provided it by Petitioners, that UMDNJ has ample private funding to ensure that the State would not be required to pay a judgment rendered against UMDNJ; rather, it could satisfy any such judgment with funds from private sources *Fuchilla v. Layman*, *supra*, 109 N.J. at 327-28, 537 A.2d at 656 (Pet. Ap. 20a-23a). This Court's "real party in interest" test thus was met.

Furthermore, the New Jersey Supreme Court not only recognized, but conscientiously applied, the other criteria utilized by this Court, and the *Urbano* analysis, to properly weigh all relevant factors. It recognized not only

that some of the *Urbano* factors, such as those concerning the financial relationship between the University and the State, are to be weighed more heavily than others, but also that no single factor was intended to be conclusive. See *Urbano, supra*, 415 F.2d at 251. For this reason, the New Jersey Supreme Court explicitly stated that some of the factors did not strongly favor a finding either of immunity or of lack of immunity. However, based upon UMDNJ's enabling statute (Pet. Ap. D), and the appropriations handbook supplied to the Court by Petitioners, the Court properly found that "[o]n balance, . . . the *Urbano* factors tip in favor of finding that UMDNJ is not the alter ego of the State for eleventh amendment purposes and therefore, is liable as a 'person' under Section 1983." *Fuchilla, supra*, 109 N.J. at 330, 537 A.2d at 657 (Pet. Ap. 29a). Thus, it is clear that the Court's analysis was correctly reasoned, in accordance with the Third Circuit's *Urbano* and *Blake* analysis, this Court's decisions, and the New Jersey Supreme Court's factual analysis of the relationship between a New Jersey university and the State of New Jersey.

Despite the correctness of the Court's decision, and the appropriateness of a state Supreme Court deciding the status of a university within its borders, in accordance with established case-by-case factual criteria, Petitioners seek "uniform federal criteria" for determining whether a university may be sued under § 1983. As has been discussed *supra*, such uniform criteria already exist and were properly applied in the present case by the New Jersey Supreme Court. A review of the petition makes clear, however, that Petitioners' request in reality is for a uniform rule under which public institutions of higher educa-

tion are *always* immune from suit, regardless of the nature of the relationship between a particular state and a particular university. The petition predicts that the use of "the type of mechanistic analysis followed by the court below would preclude almost all public institutions of higher education from claiming the protection of the Eleventh Amendment" (Pet. at 23-24). Presumably, in Petitioners' view, such dire consequences may only be avoided by a ruling from this Court prohibiting such "mechanistic" analyses as that employed by the New Jersey Supreme Court, and substituting a "mechanistic" rule granting immunity in all cases involving such universities.

This reasoning, thinly veiled in Petitioners' argument, is inadequate for several reasons. First, this Court has held that the Eleventh Amendment does not prescribe an absolute rule granting sovereign immunity to all agencies that exercise a "slice of state power." *Lake Country, supra*, 440 U.S. at 401, citing *Mount Healthy Board of Ed. v. Doyle*, 429 U.S. 274 (1977). The *Lake Country* Court, after applying what Petitioners might characterize as a "mechanistic analysis" quite similar to that of the New Jersey court in the present case, found that a bi-state planning agency was not immune from suit, notwithstanding that it was a creation of the states in which it operated. *Lake Country, supra*, 440 U.S. at 400-02. In fact, this Court, in declining to approve the blanket immunity rule utilized by the Court of Appeals in the *Lake Country* case, recognized instead the need for a case-by-case analysis, as was exercised by the New Jersey Supreme Court in the present case. *Id.*

Second, Petitioners' plea for a uniform rule is disfavored by many of the cases cited in their petition. For

example, Petitioners rely frequently and at length on the Seventh Circuit's decision in *Kashani v. Purdue University*, 813 F.2d 843 (7th Cir.), *cert. denied*, 108 S.Ct. 141 (1987), in which the Seventh Circuit held that Purdue University was the alter ego of the State of Indiana (Pet. at 26-27). The Seventh Circuit emphasized, however, that "courts reexamine the issue with regard to the facts of each case 'because the states have adopted different schemes, both intra and interstate, in constituting their institutions of higher learning.' " *Kashani, supra*, 813 F.2d at 845, *quoting United Carolina Bank v. Board of Regents*, 665 F.2d 553, 557 (5th Cir. 1982). In fact, the *Kashani* court performed an analysis very similar to that performed by the New Jersey Supreme Court in the present case. *See Kashani, supra*, 813 F.2d at 845-47. The very fact that the *Kashani* court reached a different conclusion, based upon the *facts* before it, reaffirms the validity of the Court's analysis here. The New Jersey Supreme Court merely applied the same analysis to a different set of facts. *See Kashani, supra*, 813 F.2d at 845-48; *Fuchilla, supra*, 109 N.J. at 325-30, 537 A.2d at 655-57. Indeed, the need for a case-by-case analysis has been emphasized repeatedly. *See, e.g., Hall v. Medical College of Ohio, supra*, 742 F.2d at 302, *quoting Soni v. Board of Trustees*, 513 F.2d 347, 352 (6th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976) ("[e]ach state university exists in a unique governmental context, and each must be judged on the basis of its particular circumstances").

Finally, the adoption of a rigid rule with respect to all university/state relationships would have the anomalous effect of requiring the states to ensure that their own universities are organized in accordance with what-

ever rule is established. As has been noted *supra*, each state's relationship with its public universities is its own, following no precise outline; hence the need for case-by-case analysis. See *Kashani, supra*, 813 F.2d at 845; *United Carolina Bank, supra*, 665 F.2d at 557; *Hall v. Medical College of Ohio, supra*, 742 F.2d at 302. The inevitable result of a rule dictating the manner in which all states' relationships with their universities are to be interpreted will be changes in many of those relationships, as the states seek to ensure that their universities comply with the new rule. The outcome, then, would be an unnecessary and unwarranted intrusion by the federal judiciary upon the right of individual states to conduct their statewide educational systems as they see fit. Neither the decision of the New Jersey Supreme Court here, nor the state of the existing law on this issue, warrants this Court's intervention to achieve such a dangerous result.

For the foregoing reasons, Respondent respectfully submits that this Court should deny certiorari on this issue.

II. CERTIORARI SHOULD BE DENIED BECAUSE NO FEDERAL QUESTION IS PRESENTED BY THE NEW JERSEY SUPREME COURT'S HOLDING, CONSISTENT WITH THIS COURT'S RECENT DECISION, THAT THE NOTICE PROVISIONS OF THE NEW JERSEY TORT CLAIMS ACT MAY NOT BE APPLIED TO SECTION 1983 ACTIONS.

The New Jersey Supreme Court held in the present case that the notice provisions of the New Jersey Tort Claims Act are inapplicable to actions brought in state court pursuant to Section 1983 because such state legisla-

tion thwarts a federal right, in violation of the Supremacy Clause. *Fuchilla, supra*, 109 N.J. at 330-32, 537 A.2d at 657-59 (Pet. Ap. 29a-35a). The Court's reasoning was essentially identical to that recently employed by this Court in *Felder v. Casey*, — U.S. —, 56 U.S.L.W. 4689 (1988), *rev'g*, 139 Wis.2d 614, 408 N.W.2d 19 (1987). Petitioners had relied on the now-reversed decision of the Wisconsin Supreme Court—which held that such a notice provision was proper—in support of their petition on this issue. With this Court's judgment so recently enunciated, it is respectfully submitted that no legitimate federal question exists as to this issue; indeed, it is moot. Therefore, Respondent respectfully requests that certiorari be denied on this basis.

CONCLUSION

For the foregoing reasons, the Petition of the University of Medicine and Dentistry of New Jersey and The Board of Trustees of the University of Medicine and Dentistry of New Jersey should be denied.

Respectfully submitted,

MATTHIAS D. DILEO, Esq.
Counsel of Record

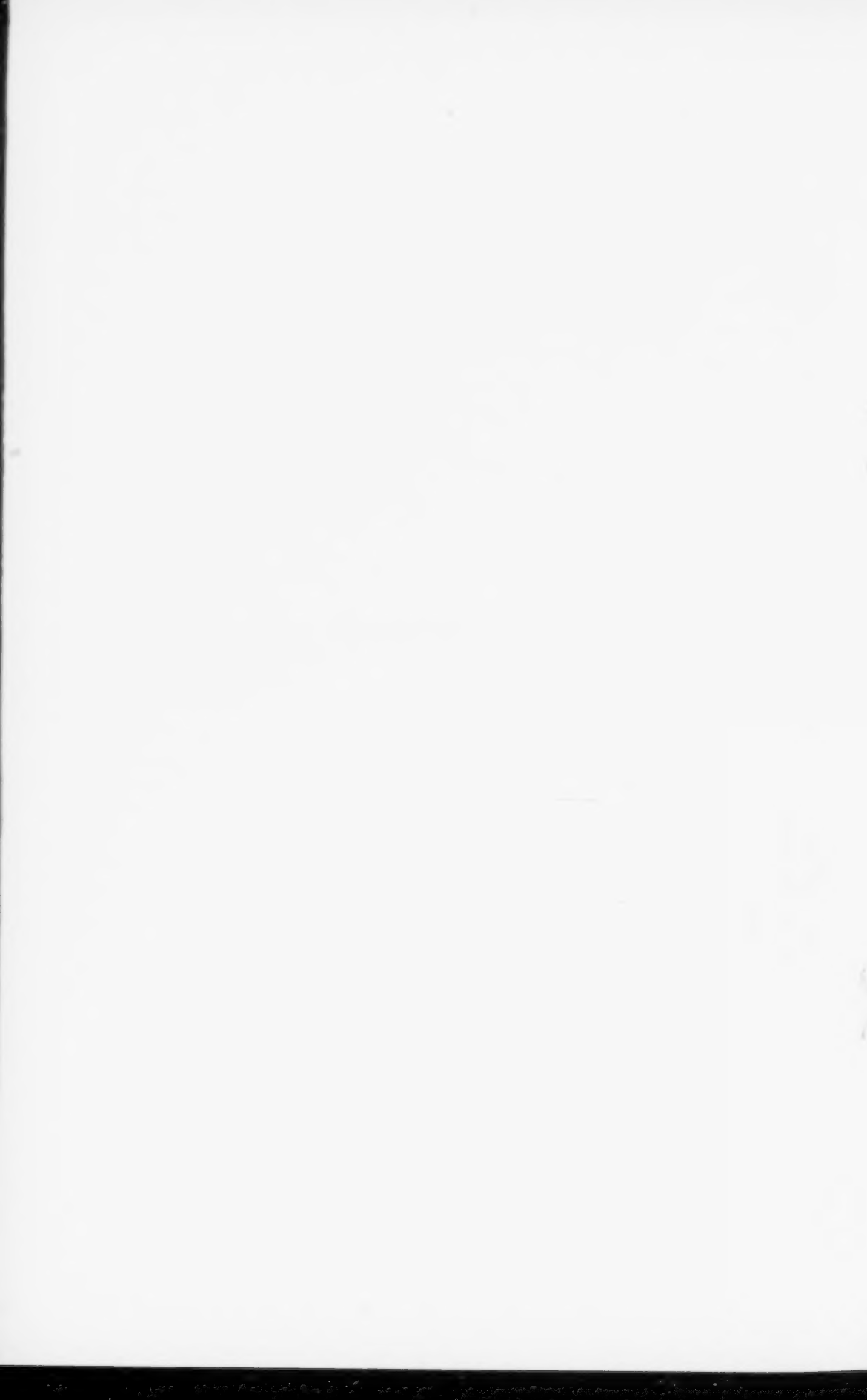
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July 14, 1988



APPENDIX



UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MARGO P. COHEN,

Plaintiff

vs.

BOARD OF TRUSTEES OF THE
UNIVERSITY OF MEDICINE
AND DENTISTRY OF NEW
JERSEY; STANLEY BERGEN,
President of University of Medicine
and Dentistry of New Jersey;
VINCENT LANZONI, as Dean,
New Jersey Medical School, and
individually; and CARROLL M.
LEEVEY, as Chairman, Department
of Medicine, New Jersey Medical
School, and individually,

Defendants

)
)
)
) Civil Action
) No. 85-3841

)
)
) OPINION

(Filed June 27, 1986)

BARRY, District Judge

I. Introduction

Plaintiff, Dr. Margo P. Cohen, held an appointment as an untenured tenure-track professor at the New Jersey Medical School of the University of Medicine & Dentistry

Ap. 2

of New Jersey (hereinafter "NJMS" and "UMDNJ" respectively). The defendants are the Trustees of UMDNJ, Stanley Bergen, President of UMDNJ; Vincent Lanzoni, Dean of NJMS, and Carroll M. Leevy, Chairman of the Department of Medicine of NJMS. NJMS is one of several component parts of UMDNJ, which was founded by Statute. N.J.S. 18A:64G-1 *et seq.* (as amended 1981). Pursuant to N.J.S. 18A:64G-6(q), UMDNJ has adopted bylaws for its governance (hereinafter "UMDNJ Bylaws"). In accord with UMDNJ Bylaw Art. 1, §2, ¶ 2.1, NJMS has drafted bylaws for its direction (hereinafter "NJMS Bylaws"). Following NJMS Bylaw Art. II, Tit. C, § 1, ¶ 1.3, NJMS has promulgated a set of guidelines for the appointment and promotion of its faculty (hereinafter "Guidelines").

Plaintiff's present dilemma began when, after a positive indication, confirmed by letter, that she would receive the recommendation of her department in the tenure process, plaintiff's department refused to recommend her for tenure, which she was subsequently denied. Plaintiff then, on August 1, 1985, filed a three-count complaint, alleging violations of her constitutional rights under 42 U.S.C. §§ 1983, 1985, 1986, and 1988. On October 9, 1985 plaintiff filed an eight-count amended complaint alleging the same federal constitutional violations (Counts 1-3), common law breach of contract (Count 4), common law misrepresentation (Counts 5 & 6), wrongful interference with economic relations (Count 7), and equitable estoppel (Count 8).

Defendants filed a summary judgment motion, requesting that they be relieved of all legal liability on plaintiff's complaint. However, defendants have only addressed the federal courts in their papers and have advised the

court that the state law claims will be the subject of a subsequent summary judgment motion. I shall, therefore, treat their motion as one for partial summary judgment pursuant to Fed.R.Civ. P. 56(d). Plaintiff has cross-moved for partial summary judgment as to liability on the 42 U.S.C. § 1983 claim and, in the alternative, requests a preliminary injunction, continuing her employment at NJMS until the termination of this suit. Before summary judgment may be granted, there must be no genuine issue of material fact and the movant must be entitled to judgment as a matter of law. Fed.R.Civ.P. 56; *Link v. Mercedes-Benz, Inc.*, 85-1552 & 85-1651 (3d Cir. 16 April, 1986); *Jersey Central Power & Light Co. v. Lacey Township*, 772 F.2d 1103 (3d Cir. 1985); *Reilly v. Firestone Tire & Rubber Co.*, 764 F.2d 167 (3d Cir. 1985).

Plaintiff, a wife and mother of three children, has been leading an extremely active professional life in academic medicine. She is widely recognized as a leader in her field, endocrinology, and has numerous awards and publications to her credit. In 1971, plaintiff became a member of the faculty of the Medical School at Wayne State University in Detroit, achieving tenure in 1977 and full professor status in 1978.

In 1982, through defendant Leevy, plaintiff was hired by UMDNJ as a full professor, but without tenure, and as Director of the Division of Endocrinology. Plaintiff made known her desire for an appointment with tenure, and defendant Leevy indicated that such an appointment would be against the policy of the institution. Dr. Leevy was incorrect. The official written policy of NJMS at the time

plaintiff was hired was that all appointments to full professorship were to be with tenure. Guidelines, I.B.1. "Professor." Subsequently, on September 3, 1985, the Guidelines were amended to provide that a full professor could be appointed with or without tenure. However, in spite of the Guideline provision in effect at the time of plaintiff's appointment, a provision of which she was unaware, on August 13, 1982 a contract, signed by plaintiff and defendant Lanzoni and specifically incorporating the UMDNJ and NJMS Bylaws, was finalized, which contract provided that plaintiff's appointment was for a three-year term ending June 30, 1985, *i.e.* it was not a tenured appointment. At the time plaintiff was hired, defendant Leevy represented to her, in effect, that she would have no difficulty in attaining tenure.

Tenure at UMDNJ, for a nontenured full professor such as plaintiff, was an automatic perquisite of reappointment. UMDNJ Bylaw Art. V, Tit. D, § 3, ¶3.3; NJMS Bylaw Art. III, Tit. E, § 2, ¶ 2.2. The rules of the University require that a candidate for reappointment serving for a period of longer than two years duration be notified one year before the end of his or her incumbent term if he or she is not to be renewed. UMDNJ Bylaw Art. V, Tit. B, § 3, ¶ c. Thus, the date such notification was due plaintiff would have been June 30, 1984. In anticipation of this deadline, on November 16, 1983 defendant Lanzoni circulated a memorandum to defendant Leevy requiring that the letter inform the former by June 8, 1984 of what action he would recommend with reference to the reappointment of plaintiff. On December 8, 1983, plaintiff forwarded a memorandum to defendant Leevy requesting the commencement of the paperwork necessary to

secure her tenure. By letter dated January 13, 1984, Dr. Leevy notified plaintiff as follows:¹

The timing and procedure for granting you tenure have been investigated. Your appointment by the Board of Trustees was June 30, 1982 and, in accordance with the three year probationary period, you will be proposed for receipt of tenure in June of 1985. This will mean that during the Fall of 1984 the tenured faculty should have available the following:

(1) Three letters of recommendation from persons external to the institution.

(2) An updated copy of your curriculum vitae.

(3) A letter from your Firm Chief giving information on your contributions to patient care.

Your accomplishments to date are quite praiseworthy. We must be certain that the FCAP Committee is provided with details of your achievements in education, patient care, research and administration, and I am sure there will be no problem.

On June 25, 1984, a week before the notice of non-renewal was due, the tenured faculty of the Department met to discuss plaintiff's reappointment. Plaintiff was praised for her productive research program, although minor complaints were raised about her educational activities. There was also concern that plaintiff had not during the preceeding two academic years served as a Teaching Attending Physician at the University Hospital, which appears to have been considered an annual requirement for faculty members. There seems to have been some sentiment that plaintiff should serve as an Attending

1. By letter dated February 1, 1984, Dr. Leevy recommended plaintiff for an annual merit increase, using such terms as "highly productive" and "revitalizing."

Physician before a formal recommendation of tenure was made. In any event, the faculty voted, 17 for, none against, to recommend plaintiff for tenure in one year. Defendant Leevy memorialized the outcome of this faculty meeting in a letter addressed to defendant Lanzoni and forwarded to plaintiff. The letter, dated June 25, 1984, stated:

Based on the recommendation of the tenured faculty (17-0-0), the Department of Medicine *plans to propose* Dr. Margo Cohen for tenure during the next academic year. In a discussion by this group it was felt that Dr. Cohen is fulfilling her education and research responsibilities. Although she has served as a subspecialty consultant and physician, it was noted that Dr. Cohen has not been an Attending as required of all full-time faculty in the Department each year. She is scheduled to serve in this capacity on Firm C during the month of October and this should allow her to fulfill the general medicine patient care responsibilities.

(emphasis added)

According to her affidavit of April 28, 1986, plaintiff believed at the time, and continued to believe for eleven months, that the June 25 letter was obviously not the notice of non-renewal required by UMDNJ Bylaw Art. V, Tit. B, § 3, ¶ c and was thus a notification of renewal indicating that she would be granted tenure. A faculty grievance committee report of March 31, 1986 agreed that plaintiff reasonably expected that the June 25 letter meant that she would, in fact, receive tenure, and that her expectation was reasonable.

Plaintiff served as an Attending Physician during the month of October, 1984, as the June 25 letter noted she would, apparently with less than distinguished reviews,

although plaintiff was not so apprised until May 15, 1985 when she received a copy of a letter of that date from defendant Leevy to defendant Lanzoni. Indeed, as plaintiff states in her affidavit, she received no notification whatsoever that her performance was in any way deficient. Rather, she was instructed by defendant Leevy, by letter dated November 13, 1984, to provide him with an updated curriculum vitae "to process a request to grant you tenure"

The faculty met on April 4, 1985 and reviewed plaintiff's performance in scathing terms. Plaintiff's research activities, previously highly praised, were cited as "small in number, but good." While I am not in a position to review the latter judgment, plaintiff's curriculum vitae belies the deprecation evident in the former attribution. There were devastating comments with reference to plaintiff's patient care activities, *i.e.* her work in Firm C during October. On April 12, 1985, the faculty met again and voted—twenty-one against, two for, one abstention—not to recommend plaintiff for tenure. The basis for this decision, as defendant Leevy advised defendant Lanzoni by letter dated June 25, 1985, was plaintiff's "failure to fulfill minimum standards for tenure as Professor of Internal Medicine, particularly in the areas of education and patient care." The faculty subsequently voted, seventeen for, none against, to recommend plaintiff for a one year terminal appointment as a Clinical Professor of Medicine upon expiration of her three-year probationary appointment on June 30, 1985. Plaintiff was not informed of this decision of the faculty until she received the letter of May 15, 1985.

Plaintiff strongly objected to the actions taken by the faculty on the tenure recommendation and to the manner in which the matter was handled. A May 31, 1985 memorandum from defendant Lanzoni to Richard C. Reynolds, Senior Vice-President for Academic Affairs of UMDNJ, indicates plaintiff's disagreement with the tenure decision and her refusal to waive her rights. On June 7, 1985, plaintiff filed a grievance requesting as relief acknowledgment and confirmation of tenure. On June 14, 1985, defendant Lanzoni forwarded a letter agreement to plaintiff indicating the terms of her one-year terminal appointment, an agreement which, it seems, plaintiff never signed. Nevertheless, plaintiff has been working from July 1, 1985 to date, apparently under the terms of the unsigned agreement. On March 31, 1986, the faculty grievance committee issued its report which agreed in large part with plaintiff's view of the circumstances surrounding her reappointment. However, plaintiff indicates in her affidavit that UMDNJ has taken no further action with respect to this report. Plaintiff's employment with UMDNJ ends on June 30, 1986 and she has yet to find a full-time position.

* * *

Defendants seek partial summary judgment as to the federal counts on several grounds. First, defendants contend that plaintiff has failed to plead a class-based discriminatory animus sufficiently to meet the requirements of 42 U.S.C. §§ 1985 & 1986. *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825 (1983); *Griffin v. Breckenridge*,

* * *

Third, the individual defendants contend they are entitled to qualified immunity under the doctrines of *Wood v. Strickland*, 420 U.S. 308 (1975) and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). For reasons more fully discussed below, defendants knew or should have known of the possible import of certain provisions of the Bylaws of UMDNJ upon which plaintiff rests a good part of her case, and therefore are not entitled to qualified immunity. *Skevofilax v. Quigley*, 586 F.Supp. 532, 535-42 (D.N.J. 1984). Moreover, there are allegations which, if proved, would indicate that several of the defendants knowingly infringed plaintiff's constitutional rights.

Finally, defendants contend that they are immune from suit under the doctrine of state sovereign immunity as embodied in the Eleventh Amendment. It is well settled that the compass of "under color of state law" for purposes of 42 U.S.C. § 1983 and "state action" under the Fourteenth Amendment [which are essentially equivalent—*Adickes v. S.H. Kress & Co.*, 398 U.S. 144(1970); *Arment v. Commonwealth National Bank*, 505 F.Supp. 911 (E.D.Pa. 1981)] is considerably wider than "state sovereign immunity" under the Eleventh Amendment. *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278 (1913); *American Civil Liberties Union v. Finch*, 638 F.2d 1336 (1981). Defendants, I note, do not contest that their actions fall inside the scope of 42 U.S.C. § 1983.

The leading test in the Third Circuit for Eleventh Amendment sovereign immunity was espoused in *Urbano v. Board of Managers*, 415 F.2d 247 (3d Cir. 1969), *cert.*

denied 397 U.S. 948 (1970), and applied by the Court of Appeals more recently in *Blake v. Kline*, 612 F.2d 718 (3d Cir. 1979), *cert. denied* 447 U.S. 921 (1980). The ultimate question is "whether an agency, commission or board which is related to the state should be regarded as the sovereign *alter ego* . . ." There are nine factors to be weighed in reaching this decision: (1) local law and decisions; (2) whether, in the event plaintiff prevails, the judgment will have to be paid out of the state treasury (considered, "perhaps the most important" factor); (3) whether the entity has the funds or the power to satisfy the judgment; (4) whether this is a proprietary or a governmental function; (5) whether the entity has been separately incorporated; (6) the entity's degree of autonomy over its operations; (7) whether it has the power to sue and be sued and to enter into contracts; (8) whether the entity's property is immune from state taxation, and (9) whether the sovereign has immunized itself from responsibility for the entity's operations.

The Eleventh Amendment immunity of defendant UMDNJ has been twice considered recently by judges of this court, *Gona v. College of Medicine & Dentistry*, Civ. No. 83-3832 (D.N.J. February 15, 1985) (order of Debevoise, J.), *Mauriello v. University of Medicine & Dentistry*, Civ. No. 83-1569 slip opinion (D.N.J. August 10, 1984) (opinion of Lacey, J.), *rev'd on other grounds* 781 F.2d 46 (3d Cir. 1986). In *Gona*, according to defendants, Judge Debevoise denied UMDNJ's motion for summary judgment after considering the Eleventh Amendment status of defendant UMDNJ. In *Mauriello*, Judge Lacey, after a full trial, decided that UMDNJ was not an *alter ego* of the state.

As Judge Lacey was deciding numerous post-trial motions on that date, his reasoning as to his decision is not expounded at great length. However, at pp. 43-44 of the transcript, apparently relying upon the representation at p. 21 of the transcript that UMDNJ received only 42% of its total operating budget from the state, Judge Lacey makes it clear that he relied upon the factor considered the most important by *Blake v. Kline, supra*: whether, in the event plaintiff prevails, the judgment will have to be paid out of the state treasury. Judge Lacey stated:

While the case is a close one, the court cannot avoid the clear consequence of a certain portion of the deposition of one Piccolo. His testimony indicates that it cannot be said with any certainty that any judgment in this case will be paid by the state rather than the university. The court has reviewed all of the cases cited by both sides, has tested the facts here against the various measuring rods of those cases, and ultimately concludes that the suit for damages against the university is not barred by the 11th Amendment.

Subsequent to that decision, it appears that the state's contribution to the UMDNJ budget has been reduced to 39%. Defendants' Reply Brief at p. 14. I might well rest my decision on this point upon grounds of offensive collateral estoppel. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). However, given the somewhat cursory nature of Judge Lacey's opinion as relevant here, I go somewhat further.

As to the first of the nine factors invoked by *Blake v. Kline, supra*, state law and decisions, there is very little. Defendants urge that, as UMDNJ's predecessor, the College of Medicine and Dentistry of New Jersey (hereinafter CMDNJ), was denominated by Supreme

Court of New Jersey "a state institution" in *English v. College of Medicine and Dentistry*, 73 N.J. 20, 22 (1977). This means no more, however, than that UMDNJ is a state university, which has nothing to do with Eleventh Amendment immunity. In addition, plaintiff aptly points out that *English v. College of Medicine and Dentistry* was decided before the 1981 amendments to the statute, which, aside from granting the school considerably greater powers, changed its name and status from college to university.

A more recent decision of the New Jersey courts is directly on point. In *Fuchilla v. Layman*, No. A-3827-84TI, slip opinion (N.J.App.Div. May 27, 1986), the Appellate Division found that UMDNJ was autonomous and definitely not an *alter ego* of the state. Judge Dreier rested his opinion upon the statute organizing UMDNJ, N.J.S. 18A:64G-1 *et seq.*, the "Medical and Dental Education Act of 1970" as amended, discussed below, and upon *DeAngelis v. Addonizio*, 103 N.J.Super. 238, 249-54 (LawDiv. 1968), cited with approval for this proposition in *Atlantic Community College v. Civil Service Commission*, 59 N.J. 102, 111 (1971). The *DeAngelis* decision dealt with the New Jersey College of Medicine and Dentistry (hereinafter "NJCMD"), one of the two predecessor institutions to CMDNJ, the other being the Rutgers Medical School (hereinafter "RMS"). The court in *DeAngelis* found NJCMD to be an independent and autonomous entity. Defendants represent that the extremely recent *Fuchilla* decision may well be appealed.

The second and third, and perhaps the most important, factors of *Blake v. Kline*, *supra*—whether the judg-

ment will have to be paid out of the state treasury and whether the entity has the funds or power to satisfy the judgment—were, as noted earlier, discussed in Judge Lacey's opinion in *Mauriello*. Moreover, UMDNJ receives, in addition to its appropriation from the state, "tuition, fees, [and moneys from] auxiliary services and other services," amounting, as stated above, to some 61% of the university budget, which the UMDNJ Board of Trustees has "the power and *duty*" to "[d]isburse" N.J.S. 18A:64G-6 generally & (c). (emphasis added) Since 1981, the UMDNJ Board has had the ability to "fix and determine, *after consultation with* the Board of Higher Education, tuition rates, and other fees to be paid by students." N.J.S. 18A:64G-6(j). Before that time, the UMDNJ Board had to seek the *approval* of the Board of Higher Education over this important independent source of income.

In addition, since its foundation, the CMDNJ Board has had the power to "[a]cquire (by gift, purchase, condemnation or otherwise), own, lease, use and operate property, whether real, personal or mixed, or any interest therein, which is necessary or desirable for college purposes." N.J.S. 18A:64G-6(n). Since 1981, under this title, the UMDNJ Board has been given power to dispose of such property, a right previously granted by N.J.S. 18A:64G-6(o). Finally, and perhaps most importantly, since 1981, the UMDNJ Board has had the right to "[b]orrow money for the needs of the university, as deemed requisite by the board, in such amounts and for such time and upon such terms *as may be determined by the board*, provided that *no such borrowing shall be deemed or con-*

strued to constitute a debt, liability, or a loan or pledge or credit, or be payable out of property or funds, other than moneys appropriated for that purpose of the State . . . " N.J.S. 18A:64G-6(o). (emphasis added) See N.J.S. 18A:64G-15.

Thus, it appears clear that UMDNJ can satisfy any judgment against it with funds from private sources. Indeed, defendants admit in their reply brief at p. 10 that any judgment would be paid at most only indirectly from state funds. Where there are substantial non-state funds which are otherwise available or are commingled with appropriations from the state, as in this case, mere commingling will not perfect the defense of sovereign immunity. *Blake v. Kline*, *supra* at 724. If after a judgment against U.N.J.M.D. the state decides to increase its funding of the school, contrary to defendants' assertion in their reply brief at pp. 7-8, 14-15, the effect on the state Treasury is merely ancillary, and therefore not barred by the Eleventh Amendment. *Edelman v. Jordan*, 415 U.S. 651, 668 (1974); *Blake v. Kline*, *supra* at 726.

As to the fourth *Blake v. Kline* factor, there is some question as to whether maintenance of a university is a proprietary, i.e., *jures gestionis*, rather than a sovereign or governmental, i.e. *jure imperii*, function. There are varying definitions of the distinction between proprietary and governmental functions. See generally Singer, "Abandoning Restrictive Sovereign Immunity: An Analysis in terms of jurisdiction to prescribe," 26 Harv. Int'l L.J. 1 (1985). See also I. Brownlie, *Principles of Public International Law*, 330-32 (1979). Some, to oversimplify, classi-

fy as "proprietary" such activities as are normally done by private entities. See *Board of Trustees v. J.P. Fyfe, Inc.*, 188 N.J.Super. 288 (L.Div. 1982), *aff'd on same point* 192 N.J.Super. 433 (App.Div. 1983), *certif. denied* 96 N.J. 308 (1984). See *Handsome v. Rutgers*, 445 F.Supp. 1362, 1367 n.7 (D.N.J. 1978). By this criterion, UMDNJ would partake of a proprietary nature. On the other hand, some hold, again oversimplifying, that acts of a commercial and profit-seeking (if not profit-making) nature are proprietary, while those that are intended for the public welfare and essentially eleemosynary (even if usually done by private entities) are governmental. See *Hall v. Medical College*, 742 F.2d 299 (6th Cir. 1984); *Miller v. Rutgers*, 619 F.Supp. 1386 (D.N.J. 1985). On this basis, UMDNJ would be governmental.

As to the fifth, sixth, and seventh *Blake v. Kline* factors: UMDNJ is separately incorporated as a body corporate and politic by virtue of the 1981 amendments to the Medical and Dental Education Act. N.J.S. 18A:64G-3. The same amendments guarantee the autonomy of UMDNJ, stating, "It is declared to be the public policy of the State that the university shall be given a *high degree of self-government* and that the government and conduct of the university shall be free of partisanship." (emphasis added) N.J.S. 18A:64G-3.1. "Autonomy," is, of course, derived from the Greek *autos* "self" and *nomos* "law," and means, "the quality or state of being self-governing." Webster's Ninth New Collegiate Dictionary 117-18 (1965). *DeAngelis v. Addonizio*, *supra*, as discussed above, found

UMDNJ autonomous.² UMDNJ has the right to sue and be sued,³ N.J.S. 18A:64G-3.4 (1981), and to contract, N.J.S. 18A:64G-6(1).

While there is no specific provision as to taxation in the Medical and Dental Education Act, UMDNJ is exempt from taxation as are all nonprofit colleges and hospitals

2. While UMDNJ still has numerous ties with the state, such as the fact that all the members of the Board of Trustees are appointed by the Governor (N.J.S. 18A:64G-4), the basic policy is thus one encouraging autonomy.

3. Defendants claim, at p. 26 n. ** of their moving brief and at pp. 18-19 of their reply brief, that UMDNJ does not have the right to sue or be sued. However, Judge Debevoise, in a recent opinion for publication, stated that UMDNJ does have that right. *Kovats v. Rutgers*, Civ. No. 82-2000 slip opinion at 13 & n. 7 (D.N.J. April 24, 1986). Confusion appears to arise out of the lack of specific wording guaranteeing the right of suit to CMDNJ and UMDNJ. The one opinion that examines this question at length has stated that CMDNJ had no right of suit. *Frank Briscoe Co. v. Rutgers*, 130 N.J.Super. 493 (L.Div. 1974). While I adopt the great majority of the reasoning of *Frank Briscoe Co. v. Rutgers*, I believe that subsequent history indicates that the case was wrongly decided on the minor issue of the right to suit of CMDNJ. *Frank Briscoe Co. v. Rutgers* was decided as it was because of the lack of explicit statutory language on the right to suit, whereas the statutes organizing NJCMD specifically allowed for such right [N.J.S. 18A:64C-8(b) (passed 1964, repealed 1970)] and the 1970 statute only preserved the right to sue and be sued for cases then pending against NJCMD N.J.S. 18A:64G-26. *Frank Briscoe Co. v. Rutgers* held that, as no specific provision for the right to suit was enacted, and only certain ongoing suits were preserved (i.e. only those by or against NJCMD, but not those of RMS), it could be inferred that no right to sue or be sued existed.

In light of the passage in 1981 of N.J.S. 18A:64G-3.4, which guarantees the preservation in the name of UMDNJ of suits then pending by or against CMDNJ, and the retention at the same time of N.J.S. 18A:64G-26. N.J.S. 18A:64G-3.4 it is fair to suggest that the legislature believed that CMDNJ had the

(Continued on following page)

in New Jersey. N.J.S. 54:4-3.6. Finally, the state has immunized itself from responsibility for UMDNJ's operations. "No provision in this act contained shall be deemed or construed to create or constitute a debt, liability, or a loan or a pledge of the credit of the State of New Jersey." N.J.S. 18A:64G-15. See N.J.S. 18A:64G-6(o).

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right to suit, or otherwise there would have been no need for the additional provision. The retention of N.J.S. 18A:64G-26 would have taken care of any suits still pending from the time of NJCMD if CMDNJ had never had an independent right to suit. Institutions that previously had the right to suit retain that right by implication unless expressly abrogated. *Frank Briscoe Co. v. Rutgers, supra* (in reference to Rutgers). In light of the 1981 amendments, therefore, I read N.J.S. 18A:64G-26 as continuing by implication the right of suit of NJCMD in CMDNJ not only for suits then pending as to NJCMD, but also as a corporate right. Thus, for these purposes, CMDNJ was not a "new" college, but a continuation of a preexisting one, the point *Frank Briscoe Co. v. Rutgers, supra* decided incorrectly. As *Frank Briscoe Co. v. Rutgers, supra* correctly decided, however, a provision for preservation of actions was not inserted for RMS, because, as a component part of Rutgers University, it had no independent right to suit and all suits pending against it at the time of its absorption by CMDNJ were retained by Rutgers University under its rights as the continuing corporation. This would be the reason for the complex statutory provisions (N.J.S. 18A:64G-29 & 30) and private agreement (referred to in *Frank Briscoe Co. v. Rutgers, supra*) to transfer all the assets and interest, state and private respectively, of RMS to CMDNJ.

This reading is further supported by the fact that the UMDNJ Board was guaranteed "such powers, rights and privileges that are incident to the proper government, conduct and management of the college [amended in 1981 to read "university"] . . . and such powers granted . . . or reasonably implied may be exercised. . . ." (emphasis added) N.J.S. 18A:64G-7. This provision was further amended in 1981 to allow UMDNJ to retain independent counsel with the approval of the Attorney General, a provision that would be far less useful if UMDNJ did not have the right of suit.

Thus, of the nine factors to be weighed under the test of *Blake v. Kline, supra*, six—the second, third, fifth, sixth, seventh, and ninth—weigh against sovereign immunity in this case. With reference to the other three factors—the first, the fourth, and the eighth—there is a certain ambiguity, but none of those factors preponderates in favor of defendants. In addition, I note that while defendants cite several cases for the proposition that Eleventh Amendment sovereign immunity attaches to state colleges and universities, while acknowledging that each case must be judged on its own facts [*Soni v. Board of Trustees*, 513 F.2d 347 (6th Cir. 1975)], the cited cases within the Third Circuit denied state institutions of higher learning sovereign immunity. *Gordenstein v. University of Delaware*, 382 F.Supp. 718 (D.Del. 1974); *Samuel v. University of Pittsburgh*, 375 F.Supp. 1119 (W.D.Pa. 1974), *on subsequent proceedings appeal dismissed* 506 F.2d 355 (3d Cir. 1974), *affirmed in relevant part, reversed in part on other grounds*, 538 F.2d 991 (3d Cir. 1976), *cert. denied* 429 U.S. 979 (1977). Moreover, the only recent case within the Third Circuit to have granted a state college or university sovereign immunity, *Miller v. Rutgers*, 619 F.Supp. 1386 (D.N.J. 1985), was recently disavowed based on new information received by its author, Judge Debevoise. *Kovats v. Rutgers*, slip opinion *supra* at 5. Judge Thompson, as well, has recently decided that Rutgers University could not assert the defense of sovereign immunity. *Varma v. Bloustein*, Civ. No. 84-2332 slip opinion (D.N.J. June 6, 1986) (opinion and order).

I find Judge Debevoise's discussion of *Mauriello* in *Kovats, supra* slip opinion at 14, to be particularly enlightening. In the first place, he infers that the Court of

Appeals for the Third Circuit, by only discussing the merits in its opinion, implicitly affirmed Judge Lacey's finding of no sovereign immunity for UMDNJ which, as a jurisdictional defense, would otherwise normally have been discussed first. See *Edelman v. Jordan*, 415 U.S. *supra* 677. Judge Debevoise changed his opinion in *Miller* for two reasons: certain new information and the treatment of *Mauriello* by the Court of Appeals. *Kovats*, *supra* slip opinion at 5. In the second place, in finding no sovereign immunity for Rutgers in *Kovats*, Judge Debevoise found the situations of Rutgers and UMDNJ very similar except that in two respects the position of UMDNJ favored sovereign immunity somewhat more than did that of Rutgers: (1) All the members of the UMDNJ Board are appointed by the Governor, whereas Rutgers is primarily governed by a Board of Governors the majority of whom are chosen by the Governor directly and a minority of whom are chosen only in part and indirectly by the Governor according to a complex process. N.J.S. 18A:65-14 & 15. (2) The Director of the New Jersey Division of Investment has control over the investment of the funds of the Board. N.J.S. 18A:64G-8. However, as discussed above, these two matters go to the autonomy of UMDNJ, which is at any rate guaranteed by N.J.S. 19A:64G-3.1.

Moreover, and a fact unbeknownst to Judge Debevoise, only 39% of UMDNJ's funding comes from the state, while 53.2% of Rutgers' budget is provided by the state. In this area of independent funds to pay a judgment, perhaps the most heavily weighted of the factors enunciated in *Blake v. Kline*, the case for denying sovereign immunity to UMDNJ is even stronger than that of Rutgers. Finally, I note that even in cases in which sov-

foreign immunity applies, that doctrine will not act to bar equitable prospective relief, even when that prospective relief will require the payment of money in the form of a salary. *Stebbins v. Weaver*, 396 F.Supp. 104 (W.D.Wis. 1975), *aff'd* 537 F.2d 939 (7th Cir. 1976), *cert. denied* 429 U.S. 1041 (1977). See *Samuel v. University of Pittsburgh*, 56 F.R.D. 435 (W.D.Pa. 1972), *subsequent proceedings* 375 F.Supp. 1119 (W.D.Pa. 1974), *on subsequent proceedings appeal dismissed* 506 F.2d 355 (3d Cir. 1974), *affirmed in relevant part, reversed in part on other grounds* 538 F.2d 991 (3d Cir. 1976), *cert. denied* 429 U.S. 979 (1977).

Finally, New Jersey law provides that academic tenure is of a unique nature in that it is one of the few personal service employment contracts susceptible of specific performance. This is so because of the difficulty in measuring damages when the employment contract is of indefinite duration and because of the importance of the status of tenured professors, "in the milieu of the college teaching profession." *American Ass'n of Univ. Profs. v. Bloomfield College*, 136 N.J.Super. 442 (App.Div. 1975), *aff'g* 129 N.J.Super. 249 (Ch.Div. 1974).

Defendants' motion to dismiss on the ground of sovereign immunity is denied.

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